Supreme Court, U.S.

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No. ____

IN THE

Supreme Court of the United States

ANDALUSIA DISTRIBUTING COMPANY, INC. *ET AL.*
Petitioners,

v.

R.J. REYNOLDS TOBACCO COMPANY,
Respondent.

ANDALUSIA DISTRIBUTING COMPANY, INC., *ET AL.*
Petitioners,

v.

PHILIP MORRIS USA, INC.
Respondent.

On Petition for Writs of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR WRITS OF CERTIORARI

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May 29, 2007

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QUESTIONS PRESENTED

These cases involve challenges by customers of R.J. Reynolds Tobacco Company and Philip Morris USA, Inc., under Section 2 of the Robinson-Patman Act, 15 U.S.C. § 13(a), to those companies' market-share-based wholesale pricing programs. In one case, there is also a claim under Section 2 of the Sherman Act, 15 U.S.C. § 2. The questions presented are as follows:

1. Whether discount prices are "functionally available" to all buyers, thus negating a claim of price discrimination under the Robinson-Patman Act, where to qualify for those prices some buyers would have to engage in actions that would effectively destroy their businesses.

2. Whether the courts below properly rejected an attempt-to-monopolize claim against Philip Morris USA, Inc., where the evidence offered by Petitioners showed that Philip Morris USA had considerable market power and that its use of market-share-based pricing had the effect of squeezing out competitors' access to the most efficient channel of distribution.

PARTIES TO THE PROCEEDING

A list of all parties to the proceedings in the court whose judgments are the subject of this petition is as follows:

Petitioners here who were plaintiffs in the case against R.J. Reynolds Tobacco Co. are: A.B. Coker, Inc., Affiliated Foods, Inc., Andalusia Distributing Company, Inc., Caldwell Wholesale Co., Inc., Dixie Tobacco & Candy Co., Inc., George Wholesale Company, Ltd., Independent Wholesale, Inc., L.P. Shanks Company, Novelart Manufacturing Co., Pelican State Cigar & Tobacco, Inc., R.C. Taylor Distributing, and Reidsville Grocery Company, Inc.

Other plaintiffs in the case against R.J. Reynolds Tobacco Co. in the courts below were: Smith Wholesale Company, Inc., Acadia Wholesale & Tobacco Co., Inc., Corso, Inc., Huntsville Wholesale Grocery, McCarty-Hull, Inc., M.K. Grocery Co., Inc., Rice Wholesale Company, Inc., and Yakima Distributing Co.

Defendant and Respondent: R.J. Reynolds Tobacco Company.

Petitioners here who were plaintiffs in the case against Philip Morris USA, Inc. are.: A.B. Coker Co., Inc., Affiliated Foods, Inc., Andalusia Distributing Co., Inc., Axton Candy & Tobacco Co., L.L.C., Buyers Wholesale Distributors, Inc., Chas. M. Sledd Co., Dixie Tobacco & Candy Co., Inc., Home Folks Wholesale Co., Independent Wholesale, Inc., Jackson Wholesale, Mydad, L.L.C. d/b/a Hardec's, Novelart Manufacturing Co. d/b/a Topicz, Pittman Brothers Co., R.C. Taylor Distributing Co., Reidsville Grocery Co., Inc., Renfro Supply Co., and Roberts Cigar & Tobacco Co., Inc.

Other plaintiffs in the case against Philip Morris USA, Inc. in the courts below were: Smith Wholesale Company, Inc., Ashland Specialty Co., Eby-Brown, Co., Forrest City

Grocery Co., Huntsville Wholesale Grocery, LAG, Inc., Macon Cigar & Tobacco Co., Inc., Market Grocery Co. d/b/a Modern Grocery Co., M-K Grocery Co., Inc. d/b/a Bates Distributing Co., Park City Tobacco, Rice Wholesale Co., Inc., Triple C Wholesale, and Wichita Candy.

Defendant and Respondent: Philip Morris USA, Inc.

CORPORATE DISCLOSURE STATEMENT

Pursuant to United States Supreme Court Rule 29.6, Petitioners A.B. Coker, Inc., Affiliated Foods, Inc., Andalusia Distributing Company, Inc., Axton Candy & Tobacco Co., L.L.C., Buyers Wholesale Distributors, Inc., Caldwell Wholesale Co., Inc., Chas. M. Sledd Co., Dixie Tobacco & Candy Co., Inc., George Wholesale Company, Ltd., Home Folks Wholesale Co., Independent Wholesale, Inc., Jackson Wholesale, LAG, Inc., L.P. Shanks Company, Mydad, L.L.C. d/b/a Hardec's, Novelart Manufacturing Co. d/b/a Topicz, Pelican State Cigar & Tobacco, Inc., Pittman Brothers Co., R.C. Taylor Distributing, Reidsville Grocery Co., Inc., Renfro Supply Co., and Roberts Cigar & Tobacco Co., Inc. make the following disclosures:

No Petitioner has a parent company, and there is no publicly held company that owns 10% or more of any Petitioner's stock.

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PETITION FOR WRITS OF CERTIORARI

Andalusia Distributing Company, Inc., *et al.* respectfully petition for writs of certiorari to review the judgments of the United States Court of Appeals for the Sixth Circuit in these cases.

OPINION BELOW

The opinion of the court of appeals in *Smith Wholesale, et al. v. R.J. Reynolds Tobacco Company* ("*Smith v. RJR*") is

reported at 477 F.3d 854. Pet. App. at 1a. The opinion of the court of appeals in *Smith Wholesale, et al. v. Philip Morris USA, Inc.* ("*Smith v. PM*") is unreported. Pet. App. at 51a. The opinion of the district court in *Smith v. PM* is unreported. Pet. App. at 75a. The opinion of the district court in *Smith v. RJR* is unreported. Pet. App. at 97a. The Report and Recommendation of the magistrate judge in *Smith v. RJR* is unreported. Pet. App. at 115a.

JURISDICTION

The court of appeals entered judgment in both cases on February 27, 2007. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

Section 2(a) of the Robinson-Patman Act, 15 U.S.C. § 13(a), provides, in pertinent part:

> It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce ... and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them....

Section 2 of the Sherman Act, 15 U.S.C. § 2, provides, in pertinent part:

> Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade

> or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony....

STATEMENT OF THE CASE

Petitioners seek review of two decisions of the U.S. Court of Appeals for the Sixth Circuit that immunize price discrimination from scrutiny under the Robinson-Patman Act as long as the seller "offers" the lower price to all buyers, even if the offer is meaningless because the seller sets conditions for qualifying for the lower price that only some favored buyers can comply with. In essence, the court of appeals held that a buyer cannot complain about being a victim of price discrimination, even if the facts show that it would be commercial suicide for the buyer to attempt to qualify for a discount price, as long as the buyer is given that worthless choice. Such an unprecedented and illogical rule conflicts with this Court's decision in *FTC v. Morton Salt Co.*, 334 U.S. 37 (1948), and effectively repeals the Robinson-Patman Act in many contexts where Congress clearly intended it to apply, including the context of volume discounts that are attainable only by certain large buyers.

In addition, in one of the cases encompassed within this petition, Petitioners seek review of the Sixth Circuit's rejection of an attempt-to-monopolize claim. That rejection cannot be squared either with the facts that Petitioners offered into evidence or with the relevant rulings from other circuits.

At issue in these cases are pricing schemes adopted by the two largest manufacturers of cigarettes – Philip Morris USA, Inc. (PM) and R.J. Reynolds Tobacco Company (RJR) – which now make up more than 80% of the domestic market. Those schemes sought to force increases in the PM and RJR market shares by rewarding wholesalers whose sales to retailers matched preset goals for percentages of sales of

PM and RJR product respectively.

Petitioners are wholesalers that sell to grocery and convenience stores and other retail outlets in a multi-state region. Tobacco products constitute 50% or more of their revenues. All Petitioners have been direct wholesalers – *i.e.*, they purchase products directly from PM and RJR – and most have been on "direct status" for more than fifty years. As full-service wholesalers, Petitioners also purchase and resell cigarettes from all other major cigarette manufacturers, as demanded by their retailer customers.

Cigarettes generally are divided into four price categories or tiers. The most expensive, first-tier or premium, cigarettes are manufactured by PM (Marlboro), RJR (Camel and Winston), and Lorillard Tobacco Company, and are sold to wholesalers for more than twenty-seven dollars per carton. Second-tier and third-tier cigarettes are also produced by the major manufacturers, but priced lower. Fourth-tier cigarettes are produced by smaller manufacturers and sell at still lower prices. PM and RJR do not price any of their cigarettes at the fourth-tier level.

Respondent PM is the industry leader with a share of the American market exceeding 50%. PM's first-tier brand Marlboro alone commands over a 40% share of the United States cigarette market. RJR is the second largest manufacturer in the United States, with a market share of approximately 31% after its July 2004 merger with the United States operations of Brown & Williamson (now Reynolds American). Most manufacturers of fourth-tier cigarettes entered the market since the Master Settlement Agreement of 1998. Fourth-tier sales grew to as high as 13% of the United States market in 2003.

PM's Wholesale Leaders Program

From 1999 through mid-2003, PM's Wholesale Leaders Program (WL) gave a 2.75% gross discount on PM products to all direct wholesalers. It also paid back-end money (*i.e.*, quarterly rebates) conditioned on whether a wholesaler achieved market-share-based sales quotas of PM brands. Thus, a wholesaler's sales of all PM brands compared with non-PM brands determined its rebate, and the best rebates were paid for achieving PM share percentages set as high as 58.9%, well in excess of PM's actual market share. In 2003, PM revised the WL program by establishing a three-level pricing system (ranging from Level 1 (the least favored) to Level 3 (the most favored)) that based both price discounts and rebates on a market-share comparison. More than half of PM's Level 3 Section targets, in the geographic areas where Petitioners operated, grossly exceeded PM's market share.

Petitioners in *Smith v. PM* competed against wholesalers who were able to receive the best price under the WL program because their customers happened to demand sufficient PM products relative to other companies' products. Petitioners, by contrast, were unable to meet PM's demands because they could not ignore *their* customers' demand for cheaper cigarettes. As a result, Petitioners found themselves paying more than their competitors for PM cigarettes – a differential that, once locked in, threatened Petitioners' ability to continue operating at all.

Under the WL program, PM's maximum per carton price differences from 1999 through 2006 ranged from $0.23 to $0.81 per carton. These price differences exceeded Petitioners' profit margins on PM products. Wholesalers receiving intermediate pricing under WL also experienced a substantial price disadvantage. The smallest price difference is significant in the cigarette distribution industry as retailers

will switch to another wholesaler for a price difference of five cents or less a carton.

RJR's Wholesale Partners Program

In August 2000, RJR implemented its Wholesale Partners Program (WPP), which established a three-level pricing system (ranging from Level 1 (the least favored) to Level 2 "H" plus Level 3 (the most favored)) that based price discounts and rebates on a comparison of the wholesaler's sales of RJR's non-premium (or savings) brands to its sales of non-RJR savings brands. The resulting price level applied to all of RJR's cigarettes (premium and savings). To attain the best price on RJR products, a wholesaler's RJR savings brands sales were required to meet ever higher percentage quotas, up to 30.1 share points higher than Level 2A's state target. The WPP's highest targets, in the states where Petitioners operated, grossly exceeded RJR's market share in such states.

Beginning in 2004, RJR adopted a share-of-market approach similar to PM where WPP quotas (and resulting discount/rebate levels) were based on the wholesaler's total RJR sales as a percentage of all cigarettes it sold. Petitioners in *Smith v. RJR* competed against wholesalers receiving the best price under the WPP throughout the complaint period. The WPP's per carton premium brand price differences between Level 1 and the best price from August 2000 through 1st Quarter 2006 ranged from $0.50 - $1.12 per carton. These price differences exceeded Petitioners' profit margins on RJR products. Wholesalers receiving intermediate pricing under the WPP also experienced a substantial price disadvantage. The best price on RJR products was achieved by fewer than 8% of RJR direct wholesalers in 2002 and 2003. The inability of the overwhelming majority of wholesalers to achieve competitive pricing applied throughout the complaint period.

Here again, Petitioners found themselves (1) unable to qualify for the lowest prices without losing customers who demanded they continue supplying relatively high levels of non-RJR products, but (2) facing potentially ruinous competition precisely because they were paying more than other wholesalers for RJR products.

The RJR Case

On January 31, 2003, Smith Wholesale Company, Inc. (Smith) filed suit in federal court against RJR alleging that, through the implementation of the WPP, RJR engaged in illegal price discrimination in violation of Section 2 of the Robinson-Patman Act, and that RJR wrongfully terminated Smith's direct purchasing status in retaliation for raising antitrust complaints about the WPP to its retail customers. The district court preliminarily enjoined RJR's termination of Smith's direct status on February 7, 2003. On February 18, 2003, Rice Wholesale Company, Inc. (Rice) was added to the RJR litigation seeking identical relief. The district court preliminarily enjoined RJR's termination of Rice's direct status on March 4, 2003. On June 11, 2003, nine additional wholesalers were added as plaintiffs in the *Smith v. RJR* litigation. Ten of these plaintiffs simultaneously sought a preliminary injunction against RJR's further 1% discount reduction at Level 1 under the 2003 WPP. On July 3 and 14, 2003, the district court granted motions by the states of Tennessee and Mississippi to intervene in the litigation on behalf of their consumers, wholesalers, manufacturers, and the economies of their states. On August 6, 2003, the district court enjoined the 2003 WPP's 1% discount reduction for Level 1 wholesalers. This preliminary injunction was later stayed. Following the issuance of the August 6, 2003 preliminary injunction, additional wholesalers joined the litigation, bringing the total number of plaintiffs to twenty.

Petitioners (and their fellow plaintiffs) argued in *Smith v. RJR* that the WPP unlawfully discriminated in price between Petitioners and their more favored competitors. Petitioners contended that the WPP's best price was not really available to them because they could not measurably increase the demand for RJR products among their existing retail customer bases. Nor could they increase their RJR market share by dropping competitor cigarettes from their product line because, as full-service wholesalers, if they failed to carry a full line of cigarette products they would lose their retailer customers. By contrast, more favored competitor wholesalers that had customer demand matching what RJR demanded in order to attain the lowest prices faced no similar difficulties. Petitioners were thus left to compete with these favored wholesalers while paying much higher prices for the same RJR products. Petitioners sought damages for loss of profits, customers, sales, goodwill, and business value that resulted from RJR's discriminatory pricing, as well as permanent injunctive relief.

At the conclusion of discovery, RJR filed a motion for summary judgment, which was referred to a magistrate judge. The magistrate judge issued a Report and Recommendation advising that RJR's motion for summary judgment should be granted and Petitioners' complaint dismissed. Pet. App. 131a. On June 3, 2005, the district court issued a Memorandum Opinion and Order, approving the magistrate judge's Report and Recommendation and granting summary judgment in favor of RJR. Pet. App. 114a.

The district court held the WPP's best price was functionally available to Petitioners, and thus no price discrimination occurred, even though it accepted as true the facts as presented by Petitioners. Pet. App. 98a, 113a. Those facts showed that (1) Petitioners' existing retailer customers

demanded a mix of RJR and non-RJR products that did not match the market shares needed to qualify for the lowest prices; (2) Petitioners had no ability to increase their customers' demand for RJR products; (3) Petitioners had no way to compete with other wholesalers for high-RJR retail accounts once they were paying substantially more under the WPP than their competitors; and (4) if Petitioners sought to comply with RJR's sales quotas by refusing to sell non-RJR products to their customers, they would lose those customers as well. Pet. App. 103a.

In sum, for purposes of summary judgment it was undisputed that Petitioners had no commercially viable way to qualify for the best prices offered by RJR. But the district court nevertheless reasoned that it was sufficient that the WPP was evenly administered by RJR, even if the best prices were not equally available to all buyers. The court concluded by finding that "the undisputed fact that an outside influence, not in control of RJR, i.e. plaintiffs' customer demands, frustrated their performance does not render the discount functionally unavailable." Pet. App. at 113a.

The Sixth Circuit affirmed. It agreed that RJR's best price under the WPP was functionally available to Petitioners, thus precluding a finding of price discrimination. The court held that as long as the best prices were *offered* to all on the same terms, even if the circumstances of Petitioners' businesses functionally prevented them from accepting, Petitioners' failure to take the steps (however self-destructive) needed to qualify was properly viewed as their own choice:

> [T]here is no evidence that anything other than plaintiffs' marketing decisions impacted their ability to obtain the WPP's best prices. The undisputed evidence demonstrates that plaintiffs faced a choice that was "not an inequity imposed by the pricing

> structure but a fundamental economic conundrum faced by all sellers."

Pet. App. 45a (quoting *Krist Oil Co. v. Bernick's Pepsi-Cola of Duluth, Inc.*, 354 F. Supp. 2d 852, 857 (W.D. Wis. 2005)). The court took no note of the fact that the conundrum was not really "faced by all sellers" because favored distributors already qualified for the best prices when the new pricing program began. The court of appeals concluded:

> As the district court properly found, the WPP's market-share discount was offered to all wholesalers using a non-discriminatory formula. It was therefore functionally available to plaintiffs not only in theory, but in fact. The capacity of plaintiffs to qualify for the WPP's best discount was a matter of market strategy and brand prioritization, a choice inherent and unavoidable in multi-brand incentive programs....
>
> Application of the WPP program may ultimately cull the number of RJR's distributors. However, the functional availability doctrine does not require a supplier to ensure the success of its customers.

Pet. App. at 49a.

The PM Case

The PM case largely paralleled the RJR case, except that it also included a Sherman Act claim. On June 11, 2003, sixteen wholesalers, including many wholesalers who were also plaintiffs in the *Smith v. RJR* case, filed suit in federal court against PM alleging that its WL program constituted illegal price discrimination under Section 2(a) of the Robinson-Patman Act, 15 U.S.C. § 13(a), and an attempt to monopolize under the Sherman Act, 15 U.S.C. § 2. These plaintiffs simultaneously sought a preliminary injunction to

enjoin PM from providing lower price discounts and rebates to Petitioners than were provided to their most favored competitors in 2003. On July 3 and 14, 2003, the district court granted motions by the states of Tennessee and Mississippi to intervene in the litigation on behalf of their consumers, wholesalers, manufacturers, and the economies of their states. On August 6, 2003, the district court granted injunctive relief. This preliminary injunction was later stayed by the Court of Appeals for the Sixth Circuit on September 18, 2003. Following the issuance of the August 6, 2003 preliminary injunction, additional wholesalers joined the litigation, bringing the total number of plaintiffs to thirty-one.

For their Robinson-Patman claim, Petitioners (and their fellow plaintiffs) argued that WL unlawfully discriminated in price for the same reasons RJR's WPP unlawfully discriminated in price. For their attempt-to-monopolize claim, Petitioners argued that PM had market strength approaching market power because: (1) it had a dominant dollar share of the market; (2) significant entry barriers existed in the United States cigarette market; (3) PM had the ability to control prices; and (4) PM excluded rivals from the market by pressuring wholesalers through WL to raise prices on competitor products, remove such products from their inventory and/or short-ship competitor products to their retail customers. Petitioners further contended that PM had the specific intent to monopolize the United States cigarette market and the WL program was exclusionary and anticompetitive. Petitioners sought damages for loss of profits, customers, sales, goodwill, and business value that resulted from PM's conduct, as well as permanent injunctive relief.

On November 1, 2004, PM filed a motion for summary judgment. On August 17, 2005, the district court issued a

Memorandum Opinion and Order, granting summary judgment in favor of PM. Pet. App. at 75a; 96a. With regard to Petitioners' price discrimination claim, the district court reiterated the reasoning of its decision in *Smith v. RJR*, holding that WL's best price was functionally available and thus no price discrimination occurred. Pet. App. at 87a-88a. Here again, it did not question Petitioners' factual claim that they were unable to qualify for the best prices because of the demands of their customers. Pet. App. 76a; 87a. It held that such a claim fails as a matter of law because it amounts to an acknowledgement that a cause other than the unilateral actions of PM – *i.e.*, customer demands – caused the price differential. Pet. App. 88a.

The district court also concluded that Petitioners failed to establish genuine issues of material fact as to their attempt to monopolize claim. Pet. App. 89a.

On appeal, the Sixth Circuit, affirmed. Pet. App. 52a. With regard to Petitioners' price discrimination claim, the court of appeals applied the same legal analysis used in *Smith v. RJR*, again agreeing with the district court that the "'undisputed fact that an outside influence, not in control of PM, i.e. plaintiffs' customer demand, frustrated their performance does not render the discounts under PM's WL program functionally unavailable.'" Pet. App. 56a.

As for Petitioners' attempt-to-monopolize claim, the court of appeals affirmed the district court's ruling that Petitioners had failed to offer evidence establishing a material dispute of fact. It held that the evidence could not be construed to support a finding that PM has a dangerous probability of achieving monopoly power. Although PM was shown to have a dollar share of U.S. sales of 56%, and it prices its cigarettes almost five times as high as fourth-tier brands, it noted that PM had lowered its price in response to competition. Pet. App. 72a-73a. Moreover, the court relied

on evidence that competitors have excess capacity available to produce cheaper cigarettes. Pet. App. 73a. It also pointed to the district court's assertion that there are relatively low barriers to entry in the cigarette industry. Pet. App. 73a-74a. And it agreed with the district court that in addition to failing to establishing a danger of monopoly power, Petitioners had also failed to show any anticompetitive conduct – another element of an attempt-to-monopolize claim under section 2 of the Sherman Act. Pet. App. 74a.

REASONS FOR GRANTING THE PETITION

Petitioners in these cases ask the Court to address the meaning of the term "functionally available," which plays a central role in the jurisprudence of the Robinson-Patman Act. The term derives not from the language of the Act but from this Court's landmark decision in *FTC v. Morton Salt Co.*, 334 U.S. 37 (1948). The Court there held that, in order to achieve the purposes of Congress, it was important to demand that discount prices be more than just "theoretically" equally available to all – *i.e.*, that they be "functionally" equally available as well. *Id.* at 42 ("Theoretically, these discounts are equally available to all, but functionally they are not.") Thus, in *Morton Salt* itself, the Court held that the defendant seller of salt could not claim its volume discounts were available to all if, in reality, only a subset of buyers were large enough to purchase at the volume level required for the discount.

These cases arise out of PM's and RJR's efforts to use their direct wholesalers as pawns in their battle against competitor (particularly fourth-tier) manufacturers. To prevent competitor access to the most efficient distribution channel in the United States – full-service wholesalers – PM and RJR adopted discriminatory price programs that charge wholesalers substantially more if their sales of non-PM or non-RJR cigarettes exceed a given percentage. These

practices harm competition at the distribution level by dramatically increasing the cost of indispensable PM and RJR products for disfavored wholesalers, thereby crippling their ability to compete in the market. They also threaten competitive harm at the manufacturing level, since their avowed purpose is to squeeze out new low-cost cigarettes. The practical effect of these programs has been to reduce both the number of competing wholesalers and the number of brand offerings in the marketplace.

The rejection of Petitioners' price discrimination claims in the courts below merits review because it was based on a legal principle that (1) conflicts with *Morton Salt*, (2) finds no support in the case law from other lower courts, and (3) makes no sense as an interpretation of the intent of Congress. The result of the Sixth Circuit's ruling will be to immunize a wide swath of potentially illegal price discrimination for no rational reason – including in the context of volume discounts, which were the focus of congressional concerns when the Act was passed. It is a simple matter to come up with qualifications for discounts that favored buyers can meet but that disfavored buyers would find ruinous. The central teaching of *Morton Salt* is that these disparate effects cannot be swept under the rug and ignored just because the seller theoretically offered the discounts to all "equally," under circumstances making the offer meaningless as to some buyers but not others. But the Sixth Circuit flouted that teaching in its rush to find a way to bless the RJR and PM market-share-based pricing programs.

The Sixth Circuit's simultaneous rejection of Petitioners' attempt-to-monopolize claim against PM also warrants review for similar reasons. The Sixth Circuit wrongly concluded that there was not even a triable dispute about the existence of a danger that PM could acquire monopoly power in the cigarette market. It so held despite competent

evidence submitted by Petitioners indicating that PM's pricing was dramatically higher than, and little affected by, the entry (and potential entry) of new competitors. The court of appeals went on to say that PM's WL program was not "anticompetitive" by its nature, even though its purpose and effect is to exclude new entrants from the most efficient channel for distribution – full-service distributors like Petitioners. As cases from other circuits demonstrate, these rulings are far out of step with the law as well as the factual circumstances of the cigarette industry.

I. The Sixth Circuit's Interpretation Flouts Governing Precedent and Has No Support in Rulings of Other Circuits.

Section 2(a) of the Robinson-Patman Act, 15 U.S.C. § 13(a), protects buyers from being charged discriminatory prices by their suppliers "where the effect of such discrimination may be substantially to lessen competition." *See also Falls City Indus., Inc. v. Vanco Beverage, Inc.*, 460 U.S. 428, 432 n.2 (1983). Petitioners here brought "secondary-line" discrimination claims – meaning they claimed that the price discrimination injured competition between them and their competitor wholesalers. They were thus required to establish four elements: (1) that the relevant PM and RJR sales were made in interstate commerce; (2) that the cigarettes were of "like grade and quality"; (3) that PM and RJR "discriminate[d] in price between" Petitioners and their wholesale competitors; and (4) that "the effect of such discrimination may be ... to injure, destroy, or prevent competition" to the advantage of these favored competitors who "receive[d] the benefit of such discrimination." *Volvo Trucks N. Amer., Inc. v. Reeder-Simco GMC, Inc.*, 126 S. Ct. 860, 870 (2006) (*citing* 15 U.S.C. § 13(a)).

There is no dispute that Petitioners satisfied the first two elements. The fourth prong, effect on competition, was never

reached because of the Sixth Circuit's ruling that there is no price discrimination as a matter of law when discounts are offered to all buyers but on terms that disfavored buyers cannot comply with and still stay in business. If the fourth prong had been reached, Petitioners were prepared to show that Respondents' practices threatened competition at both the manufacturing and distribution levels.[1]

The Sixth Circuit's ruling that no price discrimination was shown effectively overrules *Morton Salt*. Volume discounts like those at issue in *Morton Salt* constitute a classic form of price discrimination regardless of whether the discounts are offered to large and small customers alike. Because smaller customers cannot afford to buy at the requisite volumes, the offer, as to them, is an empty gesture, and they are left in the position of competing with larger competitors able to acquire product at a discount. As the *Morton Salt* Court explained the facts:

> Only five companies have ever bought sufficient quantities of respondent's sale to obtain the $1.35 per case price [the maximum discount]. These companies could buy in such quantities because they operate large chains of retail stores in various parts of the country.

334 U.S. at 41. By contrast, some small retailers made purchases in such small quantities that they could not qualify for any discount. *Id.* at 42-43.

This Court therefore rejected the defendant's "basic contention . . . that its 'standard quantity discounts [were]

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[1] This case thus bears little resemblance to *Volvo Trucks*, where this Court refused to apply the Act to bar practices that may have injured some distributors but harmed competition at neither the manufacturing nor the distribution levels. 546 U.S. at 179-80.

available to all on equal terms.'" *Id.* at 42 (quoting respondent). "Theoretically, these discounts are equally available to all, *but functionally they are not*." *Id.* (emphasis added). Accordingly, there was price discrimination that had to be scrutinized to see if it was unlawful under the Act.

The decision in *Morton Salt* and the decisions below are irreconcilable. Just like Petitioners, the smaller retailers in *Morton Salt* had a "choice" about whether to take the steps needed to qualify for the discounts. They only had to buy a larger quantity of salt than they had any hope of reselling to their existing customer base. But this Court did not see the availability of that ruinous course as precluding attacks on the defendant's pricing structure under the Robinson-Patman Act. Given that precedent, it is simply insupportable to suggest that the choice available to Petitioners – to refuse to meet their customers' demands for non-PM or non-RJR products, thus increasing the share of their sales devoted to PM or RJR products – precludes a price discrimination claim. At least where, as here, it was taken as established that making that choice would cause a massive loss of customers, the theoretical existence of the "choice" is irrelevant because it is functionally meaningless.

The Sixth Circuit cited a number of cases supposedly providing support for its understanding of functional availability, but none does so. To the contrary, these cases all involved situations in which any barriers to access to discounts were a result of the plaintiff's own conduct and free choices. Thus, in one case cited by the Sixth Circuit, the defendant offered its discounts to all, but the President and prime stockholder of the plaintiff had voluntarily signed a contract with the defendant making him territorial manager for the defendant. That contract provided that the plaintiff would no longer be able to obtain the discounts. *See Shreve Equip., Inc. v. Clay Equip Corp.*, 650 F.2d 101, 105-06 (6th

Cir. 1981) (discussed at Pet. App. 23a). Another case involved a denial of a discount because the plaintiff was in a poor financial condition and thus was not creditworthy. *See Bouldis v. U.S. Suzuki Motor Corp.*, 711 F.2d 1319, 1326-27 (6th Cir. 1983) (discussed at Pet. App. 24a-26a).

In a third case discussed below, the supposed price discrimination arose from Texaco's decision to move its distribution facility, thus causing some customers to incur higher costs than others because of where they chose to operate. *See Edward J. Sweeney & Sons, Inc. v. Texaco Inc.*, 637 F.2d 105, 121 (3d Cir. 1980) (discussed at Pet. App. 26a-27a); *see also Krist Oil Co. v. Bernick's Pepsi-Cola of Duluth, Inc.*, 354 F. Supp. 2d 852, 854-57 (W. D. Wis. 2005) (discussed at Pet. App. 27a) (lower prices are functionally available where directly tied to the retail price each wholesaler chooses to charge); *Capital Ford Truck Sales, Inc. v. Ford Motor Co.*, 819 F. Supp. 1555, 1578-79 (N.D. Ga. 1992) (discussed at Pet. App. 27a) (discounts were functionally available where the reason they were denied to plaintiff was its decision to sell to smaller volume customers as opposed to large fleet purchasers of cars).[2]

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[2] A final case cited by the Sixth Circuit involved a situation where compliance with the conditions set for a discount might have been ruinous for the plaintiff, but where the same problem would be faced by competitors as well. *See Am. Tara Corp. v. Int'l Paper Co.*, No. 79 C 1470, 1981 U.S. Dist. LEXIS 14211, at *7-*8 (N.D. Ill. July 30, 1981) (cited at Pet. App. 28a-29a) (volume-based discount was functionally available, even if acceptance would have placed plaintiff in extreme jeopardy, where competitors all faced the "same risk"). That case thus does not support the Sixth Circuit's ruling that there is no price discrimination where the conditions are ruinous for some buyers and not for others.

In the course of reviewing the case law, the Sixth Circuit noted:

> The doctrine seemingly defies the logic that a rational purchaser of goods will always seek to obtain the best discount or concession that is available to it; if a higher discount is realistically and practically available, why would a reasonable purchaser *not* take advantage of the best possible price?

Pet. App. 32a. The court sought to explain away this problem, by reviewing the same cases just discussed and concluding that

> the courts have refused to find price discrimination . . . when the purchaser's decision or capacity to take advantage of the best discount . . . *was determined by element within its control* – i.e., unrelated investments (*Krist*); poor credit ratings (*Bouldis*); management issues, inventory decisions, or marketing strategies (*i.e., Shreve, Capital Ford* and *Sweeney*); or a decision to promote the competitor's product (*Amer. Tara Corp.*) – and not by disproportionately small purchasing power or the pricing structure itself.

Pet. App. 33a (emphasis added). But that very explanation shows how the decisions in the cases at issue in this Petition are out of step with the case law. Here, there was no real choice for Petitioners. Qualification for the discounts was not something within their control, as a practical or "functional" matter (as opposed to a purely theoretical matter). The rulings below thus raise the same doctrinal conundrum that the Sixth Circuit recognized but sought to paper over. If Petitioners had an available way to qualify for the top discounts and stay in business, they would do so.

In sum, there is little or no legal support for the Sixth Circuit's rule that a discount is "available" even if the

qualifications are tailored in such a way that only favored buyers have any realistic opportunity to take advantage of it. By contrast, Petitioners cited below two decisions that were highly significant. First, they cited *National Dairy Products Corp. v. FTC*, 395 F.2d 517 (7th Cir. 1968), where the Seventh Circuit rejected the argument that discounts would have been "functionally available" if only the disfavored small buyers had "joined voluntary or cooperative [buying] groups and thus obtained higher discounts." *Id.* at 523. As Petitioners pointed out, it is hard to see how it can be too much to ask buyers to act collectively in order to obtain the best price, but acceptable to ask them to go out of business in order to accomplish the same goal. Petitioners also cited *Calumet Breweries, Inc. v. G. Heileman Brewing Co.*, 951 F. Supp. 749 (N.D. Ind. 1994), where the court rejected a functional availability defense in part because the plaintiff wholesaler of beer could not buy sufficient quantities to qualify for a discount without running the risk that the beer would go stale before market conditions would allow it to be sold. *Id.* at 756 ("Calumet's decision not to take this risk is a reasonable business decision, making Heileman's maximum quantity discount not functionally available to it.") Petitioners, of course, faced a similar problem stemming from what their available customers did and did not demand.

The Sixth Circuit's reliance on inapposite cases, while it attempted to distinguish these more relevant cases, only serves to highlight the weak legal underpinnings of the rulings below.

II. Denying Relief Just Because the Seller Offers a Meaningless "Choice" Makes No Sense.

In addition to lacking legal support, the Sixth Circuit's rule makes no sense. Under such a rule it is almost always possible for a seller to discriminate among customers in pricing, while maintaining immunity from suit, by

formulating discount schemes that favor some buyers but exclude others. When challenged, at least in the Sixth Circuit, a seller need only say that it "offered" the discounts to everyone, including those for whom the offer was useless. The Sixth Circuit's reasoning calls to mind Anatole France's famous dictum: "The law, in its majestic equality, forbids the rich as well as the poor to sleep under bridges, to beg in the streets, and to steal bread." It is not "majestic equality" but a distortion of the ordinary meaning of words to deem an offer "available" to all when only a few have any hope of accepting it.

As already suggested, the illogic of favoring form over substance has long been recognized in the context of volume discounts. This Court has noted that such discounts were a central concern of Congress:

> The legislative history of the Robinson-Patman Act makes it abundantly clear that Congress considered it to be an evil that a large buyer could secure a competitive advantage over a small buyer solely because of the large buyer's quantity purchasing ability. The Robinson-Patman Act was passed to deprive a large buyer of such advantages except to the extent that a lower price could be justified by reason of a seller's diminished costs due to quantity manufacture, delivery or sale, or by reason of the seller's good faith effort to meet a competitor's equally low price.

Morton Salt, 334 U.S. at 43.

Yet volume discounts, by their very nature, can be and typically are offered to the entire marketplace. The ostensible neutrality of such an offer does not diminish the fact that it discriminates against smaller buyers who simply cannot take advantage of the discount. Nevertheless, under

the Sixth Circuit's approach to the Act, such an offer to all buyers would make the discounts *per se* lawful, requiring no other analysis or justification.

It is no answer to say that this case involved something other than volume discounts. The reach of the Act is not limited to volume discounts. *FTC v. Sun Oil Co.*, 371 U.S. 505, 520 (1963) ("Congress sought generally to obviate price discrimination practices threatening independent merchants and businessmen, presumably from whatever source."). Moreover, the *basis* on which the claim was rejected would be equally applicable in the volume-discount context. And the Sixth Circuit's rule is equally indefensible whether the discount is based on volume or (as here) the seller's percentage share of the buyer's sales.

Nor is it an answer to say, as the courts below did, that the Petitioners' problems were not caused by the actions of RJR and PM but instead were caused by "an outside influence . . . i.e., plaintiffs' customer demands." Pet. App. 10a, 55a, 88a, 113a. It is true that Petitioners' difficulties stemmed in part from the demands received from their available customers, which prevented them from achieving the market-share goals set by Respondents. But there will always be such an "outside influence" in situations where discounts are "theoretically" offered to everyone but are not "functionally available" to all within the meaning of *Morton Salt*. For example, in *Morton Salt* itself, the limitation faced by smaller retailers was caused by the fact that their customers did not demand enough salt to allow the retailers to (1) qualify for volume discounts and (2) resell all the salt they bought.

An "outside influence" exception to the requirement of functional availability thus would swallow the doctrine altogether. This Court should grant review of a ruling that, if left standing, will make the Act almost a dead letter.

III. The Sixth Circuit's Erroneous Rejection of the Section 2 Attempt-to-Monopolize Claim Against PM Also Warrants Review.

As noted at the outset, in the case against PM, the Sixth Circuit also affirmed the district court's grant of summary judgment against Petitioners on their separate claim of attempt to monopolize in violation of section 2 of the Sherman Act, 15 U.S.C. § 2. That ruling also warrants review because it is in conflict with rulings from other circuits.

In order to demonstrate attempted monopolization, a plaintiff must show that the defendant (1) engaged in anticompetitive conduct with (2) a specific intent to monopolize and (3) a dangerous probability of achieving monopoly power. *See Spectrum Sports, Inc. v. McQuillan*, 506 U.S. 447, 456 (1993). The Sixth Circuit's ruling focused on prongs one and three.

A. Danger of Monopoly Power

First, with regard to the dangerous probability of success issue, the court of appeals held that it was not enough for Petitioners to show that PM has over 50 percent of the market and sells its products for nearly five times the price of fourth-tier competitors' products. Pet. App. 72a-73a. It pointed to the fact that PM had at times lowered its price when it experienced a loss of market share. But the facts actually showed the PM lowered its price to favored buyers while raising it to disfavored buyers. Moreover, PM's market share actually increased each year from 2002 to 2005, even though it *raised* its prices in four of the five years from 1999-2004.

The court of appeals also pointed to existing excess capacity in the industry and what it perceived to be relatively low barriers to entry. But Petitioners' expert had done an

analysis of these factors and concluded that PM's customers were extremely brand-loyal and there was little indication that new entry had had much effect on PM's pricing or sales.

The weakness of the Sixth Circuit's analysis is dramatized by the very different conclusions reached by two other circuits. First, in *R.J. Reynolds Tobacco Co. v. Cigarettes Cheaper!*, 462 F.3d 690 (7th Cir. 2006), *cert. denied*, 127 S. Ct. 1330 (2007), the Seventh Circuit recently made the following observations when examining the issue of market power in the United States cigarette industry as it relates to PM's significantly smaller competitor, Reynolds American:

> The district court concluded that Reynolds's 25% share of the cigarette market is too small to create market power. That decision is . . . questionable . . . . It is questionable as an empirical matter because the record (which on summary judgment must be construed favorably to Cigarettes Cheaper!) does not demonstrate that Reynolds lacks power to make significant price increases without substantial loss in sales. The cigarette market is concentrated (the Herfindahl-Hirschmann Index exceeds 3,000); new entry is difficult if not impossible; customers perceive quality differences among brands (so that a price increase for one brand does not immediately divert customers to rivals); Reynolds's own discounting practices show that it regularly changes price substantially without creating dramatic swings in its sales. The Supreme Court has found market power in circumstances more favorable to the defendant. *See United States v. Philadelphia Nation Bank*, 374 U.S. 321, 83 S. Ct. 1715, 10 L.Ed.2d 915 (1963).

Id. at 694-95 (internal citation omitted).

The Fourth Circuit also has expressly declined to conclude "that PM lacks market power" in the United States cigarette market. In *R.J. Reynolds Tobacco Co. v. Philip Morris Inc.*, 199 F. Supp. 2d 362 (M.D.N.C. 2002), the district court rejected an antitrust claim against PM. The Fourth Circuit affirmed, adopting the opinion of the district court, but it made a point of excepting the district court's conclusion that PM lacks market power. 67 F. App'x. 810, 812 (4th Cir. 2003).

In addition, this Court has repeatedly held that "[t]he existence of [market] power ordinarily is inferred from the seller's possession of a predominant share of the market." *Eastman Kodak Co. v. Image Technical Servs., Inc.*, 504 U.S. 451, 464 (1992); *United States v. Grinnell Corp.*, 384 U.S. 563, 570-71 (1966) (same). Because PM enjoys control of over half the relevant market for cigarettes, the court of appeals should have followed this Court's instruction and inferred the existence of market power. Instead, the court mistakenly concluded that no genuine issues of material fact exist regarding the dangerous probability that PM will achieve monopoly power.

B. Anticompetitive Conduct

As for the anticompetitive conduct element of Petitioners' attempt-to-monopolize claim, the court of appeals simply adopted the district court's erroneous conclusion that "plaintiffs' proof establishes only harm to individual competitors, not harm to competition." Pet. App. at 94a. However, WL harms interbrand competition and excludes rivals from the most efficient distribution channel in the United States. PM competitors testified that WL forced many wholesalers to drop their products and replace them with more expensive PM brands in attempt to meet WL targets. This, in turn, was very likely to result in increased competitor costs and prices on their products because of

limited access to the full-service distribution network. The record evidence demonstrated that WL caused wholesalers to artificially raise the price on PM's competitors' products in order to suppress retailer demand of such products. The cumulative effect of WL is a leveling off or decrease in fourth-tier manufacturers' market share after 2003. Plaintiffs testified that they were forced to take steps to harm PM's competitors in desperate, but failed, attempts to qualify for WL's best price. PM officials also privately encouraged multiple Petitioners to take these anticompetitive actions against other cigarette manufacturers. The lower courts failed to construe the record evidence favorably to Petitioners.[3]

Courts enforcing Section 2 of the Sherman Act have condemned similar conduct that undermines competition by making access to competitor products more difficult or costly. In *Conwood Co. v. U.S. Tobacco Co.*, 290 F.3d 768 (6th Cir. 2002), the Sixth Circuit affirmed a $1.05 billion treble damage award against a dominant manufacturer's attempt to exclude discount competition in the moist snuff market. Much like PM in the instant case, the defendant sought to use its position to "exclude competition by suggesting that retailers carry fewer products, particularly competitor's products; by attempting to control the number of price value brands introduced in stores; and by suggesting that stores carry its slower moving products instead of better selling competitor products." *Id.* at 785-86.

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[3] While the Sixth Circuit did not reach the issue of specific intent to monopolize, PM's internal planning documents, as well as other evidence proffered by Petitioners, demonstrated that PM intended the WL program to raise rivals' costs and curtail access to the most efficient distribution channel in the United States – full-service wholesalers.

In *LePage's Inc. v. 3M*, 324 F.3d 141 (3d Cir. 2003), the Third Circuit condemned a share-based pricing program that restricted the availability of competitors' lower-priced transparent tape to consumers. Like PM, 3M offered customers "substantial rebates to induce them to eliminate or reduce their purchases" from competitor manufacturers. *Id.* at 154. The Third Circuit affirmed the district court's holding that 3M's share-based program was anticompetitive in part because it "caused distributors to displace [plaintiff's products] entirely, or in some cases, drastically reduce purchases from [plaintiff]." *Id.* at 160. Other courts reach the same conclusion under Section 2 of the Sherman Act for similarly anti-competitive programs. *See United States v. Dentsply Int'l. Inc.*, 399 F.3d 181, 191 (3d Cir. 2005), *cert. denied*, 126 S. Ct. 1023 (2006) (program that had practical effect of excluding competitors' products from established full-service distribution channel unlawful); *General Indus. Corp. v. Hartz Mountain Corp.*, 810 F.2d 795, 807 (8th Cir. 1987) (attempt to restrict consumer's access to competing products violates the Sherman Act); *see also* Willard K. Tom, David A. Balto & Neil W. Averitt, *Anticompetitive Aspects of Market-Share Discount and Other Incentives to Exclusive Dealing*, 67 Antitrust L.J. 615, 627 (2000).

The Court should grant review to determine whether it was defensible for the courts below to reject, at the summary judgment stage, a claim that the dominant cigarette company in this country was seeking to gain monopoly power by forcing its distributors to squeeze out lower-priced manufacturers from their sales to retailers. At a minimum, that claim merited a closer look than it received here.

CONCLUSION

The petition for writs of certiorari should be granted.

Respectfully submitted,

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May 29, 2007

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APPENDIX

Appendix A

United States Court of Appeals Sixth Circuit.

SMITH WHOLESALE COMPANY, INC., Rice Wholesale Co., Inc., Andalusia Distributing Co., Inc., Dixie Tobacco & Candy Co., George Wholesale Co., Ltd., Independent Wholesale Inc., L.P. Shanks Co., McCarty-Hull Cigar Co., Inc., R.C. Taylor Distributing Co., Reidsville Grocery Co., Inc., A.B. Coker Co., Inc., Affiliated Foods, Inc., Acadia Wholesale & Tobacco Co., Caldwell Wholesale Co., Inc., Novelart Manufacturing Co., Yakima Distributing Co., Inc., Huntsville Wholesale Grocery, Pelican State Cigar & Tobacco, Inc.,
Plaintiffs-Appellants,

State of Mississippi, and State of Tennessee,
Intervenor Plaintiffs,

M.K. Grocery Co., Inc., and Corso, Inc.,
Plaintiffs,

v.

R.J. REYNOLDS TOBACCO COMPANY,
Defendant-Appellee.

No. 05-6053

Argued: April 21, 2006.
Decided and Filed: Feb. 27, 2007.

OPINION

GRIFFIN, Circuit Judge.

In this case alleging illegal price discrimination in violation of Section 2(a) of the Clayton Act, as amended by the Robinson-Patman Price Discrimination Act ("the Act"), 15 U.S.C § 13(a), the plaintiffs-appellants, eighteen full-service wholesalers who are also direct distributors for defendant R.J. Reynolds Tobacco Company ("RJR"), appeal the district court's order of summary judgment entered pursuant to Federal Rule of Civil Procedure 56(c) in favor of defendant RJR. We affirm.

I.

The eighteen plaintiffs-appellants in this case, lead by plaintiff Smith Wholesale Company, are full-service distributors serving grocery and convenience stores and other retail outlets in a multi-state region, primarily in the southeastern United States. Tobacco products constitute 50% or more of their revenues. All of the plaintiffs are direct distributors of defendant RJR, some having distributed RJR's products for more than fifty years. Plaintiffs also purchase cigarettes from all other major manufacturers, as well as fourth-tier manufacturers.

Cigarettes are divided into four price categories or tiers. The most expensive, first-tier or premium, cigarettes are manufactured by defendant RJR (Camel and Winston cigarettes), as well as Philip Morris USA, Inc., Lorillard Tobacco Company, Liggett-Vector Brands, and Commonwealth Brands. Second-tier and third-tier cigarettes are also produced by the major manufacturers, but their prices are substantially lower than first-tier cigarettes. Fourth-tier brands are produced by smaller manufacturers (including Liggett and Commonwealth) and sell at prices somewhat lower than third-tier brands. All of RJR's discounted, non-premium brands are collectively classified as "savings" brands. RJR's second-tier product is Doral; its third-tier cigarettes include Monarch, Best Choice, Citation,

and Cardinal. RJR does not price any of its savings brands at the fourth-tier level.

RJR is the second largest cigarette manufacturer in the United States, with a market share of approximately 22% prior to its July 2004 merger with the United States operations of Brown & Williamson.[1] The newly formed Reynolds American now has a market share of approximately 31%. At the other end of the spectrum, the fourth-tier segment has grown from 0.89% of all cigarette sales in 1998 to around 15% in 2003, making it the fastest growing portion of the cigarette market. Competitive pressure increased following the industry's 1998 Master Settlement Agreement, which settled smoking and health litigation by requiring per carton payments to the settling states. That agreement led to the rapid growth of producers of fourth-tier cigarettes that did not make settlement payments. RJR's market share has decreased in this competitive environment.

In April 2000, in an effort to allay its declining market share, RJR sought to enlist wholesalers in RJR's marketing efforts by providing financial incentives to wholesalers willing to focus on RJR savings brands. The new Wholesale Partners Program ("WPP") emphasized its savings brands because of the importance of RJR's Doral savings brand to its overall business. The WPP revised RJR's wholesale pricing structure through a three-level pricing system, ranging from Level 1 (the least favored), Levels 2 "A" through "H," to Level 3 (the most favored), which based price discounts and back-end monies[2] on a comparison of the

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[1] Philip Morris USA, Inc., by contrast, accounted for nearly 50% of all cigarette sales in 2000. Marlboro, Philip Morris's largest brand, commanded a 38% share, over 50% higher than the combined shares of all of RJR's brands.

[2] Rebates paid to distributors at the close of each quarter.

distributor's sales of RJR's savings brands to its sales of non-RJR savings brands. All wholesalers could earn a base discount by participating in Level 1, although the amount of the Level 1 discount diminished over time until it ended in June 2003. To earn discounts at Level 2 or payments at Level 3, wholesalers were required to meet quarterly targets based on their sales of RJR savings brands as a percentage of their total savings brand sales.

Wholesalers that met their share targets earned the same Level 2 discounts.[3] For five quarters beginning in the third quarter of 2002, wholesalers also earned additional, progressively higher quarter-end payments (so-called Levels 2A through 2H rebates), depending on the extent to which their RJR savings share exceeded the base share targets.[4]

The discount/rebate structure of the WPP is best summarized by the magistrate judge in his Report and Recommendation in this case:

> First, in each state the defendant ascertained what *percentage* of each wholesaler's total sales of savings

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[3] Wholesalers received certain Level 3 payments (received as quarterly rebates) once they qualified for Level 2 discounts, as long as changes in their RJR share during the relevant quarter did not differ meaningfully from changes in RJR's statewide share during the same period. Level 2 wholesalers also earned other Level 3 rebates to the extent they performed additional functions that RJR sought to reward.

[4] RJR modified the WPP several times from August 2000 to the present. From the second quarter of 2002 through the third quarter of 2003, Level 2 contained the eight price categories (Levels A-H). Level 2A was set at the minimum Level 2 RJR share of savings ("SOS") brands threshold to 1.5 share points above this minimum SOS threshold; only when a distributor exceeded its Level 2A SOS quota by 30.1 points would it then qualify for Level 2H back-end monies. In 2003, RJR again modified the WPP to further reduce the Level 2 and 3 back-end monies available to Level 2A distributors.

brand cigarettes consisted of RJR's savings brand cigarettes. Each wholesaler was then ranked in descending order, with the wholesaler having the highest percentage of RJR cigarettes listed at the top, and the wholesaler selling the smallest percentage of defendant's products (relative to the total sales of savings brand cigarettes) at the bottom. The defendant thereupon listed the *volume* of its savings brand cigarettes sold by each of the distributors. It is important to note that the distributor listed at the top, which sold the highest percentage of defendant's products, did not necessarily sell the highest *volume* of defendant's products; indeed, the distributor with the highest percentage of defendant sales very easily could have been the distributor that sold the lowest volume of defendant's products.

After determining the volume of defendant's cigarettes sold by each distributor in the descending order discussed in the preceding paragraph, [defendant] ascertained the *total volume of RJR savings cigarettes sold in each state.* Defendant then selected as its state target the RJR percentage of that wholesaler whose volume sales, when added to all those above it, equaled eighty-five percent (or as close thereto as possible) of defendant's total wholesale volume in the state. Defendant thereafter calculated a "share-of-savings" target for each wholesaler, using the state targets described above. The target was stated in terms of defendant's "savings brands" as a percentage of the total sales of cheap cigarettes sold by a distributor. For those wholesalers doing business in more than one state (and there were several), defendant had yet another formula that adjusted a multi-state wholesaler's target goals to reflect the different states in which that wholesaler

> does business. The closer a wholesaler comes to the goal established for it, the higher the incentive level applicable to it. And the higher the incentive level, the lower the price it pays for defendant's cigarettes. It is at first difficult to understand, and even more difficult to describe in words, but it does have a mathematical logic to it, and the resulting state target is intended to capture eighty-five percent of the volume of defendant's savings brand in any particular state.
>
> As noted, the incentive level in which any wholesaler was placed determined the amount that wholesaler paid for defendant's savings brand cigarettes. Obviously, some wholesalers participated at higher levels than others, which meant that they purchased their cigarettes from defendant at a cheaper price. This price differential resulted in this litigation.

Because participation in the WPP did not depend on the volume of a wholesaler's RJR sales, small wholesalers were treated ostensibly the same as large wholesalers. From August 2000 through the first quarter of 2004, all discounts and rebates received under RJR's WPP were based solely on a distributor's RJR SOS brands. Beginning in the second quarter of 2004, RJR adopted a "share of market" approach, whereby WPP quotas, and resultant discount/rebate levels, were thereafter based on the distributor's total RJR sales (savings and premium) as a percentage of all cigarettes it sold.[5]

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[5] Only the WPP for the years 2000-2003 are at issue in the present case. The 2004-2005 WPP is identical to that of its competitor, Philip Morris USA, Inc.'s Wholesale Leaders Program, which has been similarly challenged as a violation of the antitrust laws and is currently pending

The WPP's per carton premium brand price differences between Level 1 and the best price from August 2000 to present were approximately: ($0.55) August 2000-April 2001; ($0.50) May 2001-May 2002; ($0.57) June 2002-December 2002; ($0.85) January 2003-June 2003; ($1.12) July 2003-September 2003; ($0.75) October 2003-March 2004; and ($0.74) April 2004-present.

All wholesalers entered the program at Level 2. A Level 2 wholesaler that missed Level 2 in any quarter received a three-month grace period to maintain its Level 2 status. The WPP placed no limit on the volume that wholesalers could sell to any customer and capped quarterly increases in a wholesaler's target at 0.5%, even if RJR's actual share increased by a larger percentage, while reducing a wholesaler's target by the full amount of any decrease in RJR's actual share.

Fifteen of the eighteen plaintiffs have participated at Levels 2 and 3 at some point since 2000. However, plaintiffs complain that to attain the best price on RJR products-achieved by fewer than 8% of RJR's direct distributors in 2002 and 2003-a distributor's RJR savings brand sales were required to meet ever higher percentage quotas. Plaintiffs allege that it was impossible to meet RJR's SOS targets because they sell to retailers in rural, lower income areas that had a uniquely high demand for the cheapest, fourth-tier cigarettes. Plaintiffs complain that because RJR's highest share quotas, and its most favored prices, are not practically and realistically achievable by plaintiffs, all have been classified as Level 1 distributors (some for the entire complaint period) under the WPP.

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before this court. *See Smith Wholesale Co. et. al. v. Philip Morris USA, Inc.*, Case # 05-6481.

On January 31, 2003, plaintiff Smith Wholesale Company filed suit in federal court against defendant RJR alleging that, through implementation of the WPP, RJR engaged in illegal price discrimination in violation of Section 2(a) of the Clayton Act, as amended by the Robinson-Patman Act, 15 U.S.C. § 13(a), and further, that RJR wrongfully terminated its direct purchasing status in retaliation for raising antitrust complaints about the WPP to its retail customers. On February 18, 2003, Smith amended its complaint to add another wholesaler, Rice Wholesale Company ("Rice"), after RJR ended its wholesale agreement with Rice. Smith and Rice filed preliminary injunction motions, seeking reinstatement of their wholesale agreements, which were granted on February 7 and March 4, 2003, respectively.[6]

On June 11, 2003, Smith and Rice amended their complaint for the third time, adding nine additional plaintiffs. Ten of these plaintiffs simultaneously sought a preliminary injunction against the further 1% discount reduction at Level 1 under the 2003 WPP. On July 3 and 14, 2003, the district court granted motions by the states of Tennessee and Mississippi to intervene in the litigation on behalf of their consumers, wholesalers, manufacturers, and the economies of their states.[7] On August 6, 2003, the district court enjoined the 2003 WPP's 1% discount reduction for Level 1 distributors, but later stayed it. Following issuance of the preliminary injunction, additional distributors joined the litigation, and the complaint was amended for the fifth time,

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[6] RJR appealed, but voluntarily dismissed its consolidated appeal of those preliminary injunctions on June 27, 2005, after the entry of summary judgment in its favor in the instant case.

[7] The States have not joined in the present appeal from the order granting summary judgment to defendant.

to bring the total number of plaintiffs to twenty-two. Plaintiffs seek damages for loss of profits, customers, sales, goodwill, and business value that allegedly resulted from RJR's discriminatory pricing. Plaintiffs also seek permanent injunctive relief.

After discovery concluded, RJR filed a motion for summary judgment, which the district court referred to the magistrate judge who, after hearing extensive argument by the parties, issued a Report and Recommendation advising that RJR's motion for summary judgment should be granted and plaintiffs' complaint dismissed. On June 3, 2005, after full briefing of plaintiffs' objections, the district court issued a Memorandum Opinion and Order, in which it adopted and approved the magistrate judge's Report and Recommendation and granted summary judgment in favor of RJR.

In its decision, the district court concluded that summary judgment was appropriate because RJR's discounts were "functionally available" to the plaintiffs, *i.e.*, "[t]he practice of conditioning price concessions and allowances upon the customer's purchase of a specific quantity of goods will not give rise to a Robinson-Patman violation if the concessions are available equally and functionally to all customers." *Bouldis v. U.S. Suzuki Motor Corp.*, 711 F.2d 1319, 1326 (6th Cir. 1983). The district court opined, in pertinent part:

> [T]his case does not involve a quantity discount, the plaintiffs' [sic] were told about the discount, and the plaintiffs were permitted to participate in the program. The Court FINDS that RJR's discount is available to all customers using a nondiscriminatory formula, even though different customers may pay different prices, and that there is no evidence that the program was not evenly administered. Therefore, this

Court FINDS that RJR's discount was functionally available to the plaintiffs in both theory and in fact.

* * *

Although the plaintiffs contend that RJR's discounts are not functionally available to them because of the demands of their customers, applicable case law does not support the plaintiffs' conclusion that the demands of a purchaser's customer can render a discount functionally unavailable. Courts have refused to find discrimination when the buyer's inability to take advantage of the best discount was within the control of the buyer, such as poor credit, management choices, decisions not to hold inventory, or particular marketing strategies. *See Bouldis*, 711 F.2d at 1327; *Shreve [Equipment, Inc. v. Clay Equipment Corp.]*, 650 F.2d [101], 105 [(6th Cir. 1981)]; *Edward J. Sweeney [& Sons Co. v. Texaco, Inc.]*, 637 F.2d [105], 121 [(3d Cir. 1980)]; *Chapman v. Rudd Paint & Varnish Co.*, 409 F.2d 635, 643 (9th Cir. 1969).

The Court FINDS that the undisputed fact that an outside influence, not in the control of RJR, *i.e.* plaintiffs' customer demands, frustrated their performance does not render the discount functionally unavailable. Therefore, because RJR's discount was functionally available, under the undisputed facts of this case, the defendant has demonstrated the lack of an essential element of the plaintiffs' case, *i.e.* price discrimination.

In this case, the Court also FINDS that there is no causal link between RJR's practices and the plaintiffs' alleged injuries. Plaintiffs contend that they did not make a voluntary choice to emphasize fourth-tier or other non-RJR brand [s] over RJR'[s]

> products, but that they have simply responded to the demands of their customers. Therefore, by their own admission, the plaintiffs' inability to participate in WPP is attributable to an outside influence over which RJR had no control. In effect, the plaintiffs seek to reap the rewards of the WPP without furthering the purpose of that program, *i.e.*, increasing the demand for RJR products.
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> The Court FINDS that, because the plaintiffs did not take advantage of a lower price or discount which was functionally available on an equal basis, no price discrimination has occurred. In the alternative, the Court FINDS that any alleged discrimination was not the proximate cause of the plaintiffs' injuries.

Plaintiffs' timely appeal followed.

II.

This court reviews a district court's decision granting summary judgment de novo. *Kessler v. Visteon Corp.*, 448 F.3d 326, 329 (6th Cir. 2006). Summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). The evidence must be viewed in a light most favorable to the party opposing the motion, giving that party the benefit of all reasonable inferences. *Kessler*, 448 F.3d at 329. However, "the nonmoving party must do more than simply show that there is some metaphysical doubt as to the material facts, *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986), it must present significant probative evidence in support of its complaint to defeat the motion for summary judgment." *Expert Masonry, Inc. v. Boone County, Ky.*, 440 F.3d 336, 341 (6th Cir. 2006).

"A mere scintilla of evidence is insufficient; there must be evidence on which the jury could reasonably find for the non-moving party." *Kessler,* 448 F.3d at 329.

In this circuit, motions for summary judgment are disfavored in antitrust litigation. *Expert Masonry, Inc.,* 440 F.3d at 341. This general rule, however, does not preclude the use of summary judgment in an antitrust case in which there clearly are no genuine issues of fact to try-"[i]ndeed, the very purpose of a motion for summary judgment, to eliminate a trial where it would be unnecessary and merely result in delay and expense, warrants summary disposition of such cases when appropriate." *Bouldis,* 711 F.2d at 1324. "Accordingly, 'the absence of any relevant probative evidence in support of a litigant's antitrust claims will expose such claims to summary judgment disposition.'" *Id.* (quoting *Davis-Watkins Co. v. Serv. Merch.,* 686 F.2d 1190, 1197 (6th Cir. 1982)).

III.

A.

Plaintiffs contend that the district court erred in dismissing their claims of illegal price discrimination under § 2(a) of the Clayton Act, as amended by the Robinson-Patman Act. 15 U.S.C. § 13(a) provides, in pertinent part:

> It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce ... and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or

> knowingly receives the benefit of such discrimination, or with customers of either of them: *Provided,* That nothing herein contained shall prevent differentials which make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered....

"Essentially, this section makes it unlawful for a seller to discriminate in price between purchasers of the same or similar goods actually sold, whether to the ultimate purchaser or for resale, if the effect of such price discrimination may be to lessen competition substantially in a line of commerce or with the competitors of the seller or its customers." *Bouldis,* 711 F.2d at 1325.

Three categories of competitive injury may give rise to a Robinson-Patman claim: "primary-line" cases involve conduct that injures competition at the level of the discriminating seller and its direct competitors; "secondary-line" cases, like the instant case, implicate price discrimination that injures competition among the discriminating seller's customers, typically referred to as "favored" and "disfavored" purchasers; and "tertiary-line" cases entail injury to competition at the level of the purchaser's customers. *Volvo Trucks North America, Inc. v. Reeder-Simco GMC, Inc. ("Volvo Trucks"),* 546 U.S. 164, 126 S.Ct. 860, 870, 163 L.Ed.2d 663 (2006).

A viable secondary-line price discrimination claim brought pursuant to this Act requires proof that "(1) the relevant ... sales were made in interstate commerce; (2) the [commodities at issue] were of 'like grade and quality'; (3) [the defendant] 'discriminate[d] in price between' [different purchasers of the like commodities]; and (4) 'the effect of such discrimination may be ... to injure, destroy, or prevent

competition' to the advantage of the favored purchaser, *i.e.*, one who 'receive[d] the benefit of such discrimination.'" *Volvo Trucks*, 126 S.Ct. at 870, 126 S.Ct. 860 (quoting 15 U.S.C. § 13(a)).

In the recent *Volvo Trucks* decision, the Supreme Court addressed the issue of secondary-line price discrimination under § 13(a), albeit in a very narrow context.[8] The *Volvo*

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[8] The precise issue addressed by the Court was "whether a manufacturer offering its dealers different wholesale prices may be held liable for price discrimination proscribed by Robinson-Patman, absent a showing that the manufacturer discriminated between dealers contemporaneously competing to resell to the same retail customer [?]" 126 S.Ct. at 866. Reeder, a Volvo dealer, commenced suit against Volvo alleging that its sales decreased because Volvo offered other favored dealers price concessions not offered to Reeder. At issue were specially ordered heavy-duty trucks supplied by Volvo and sold by franchised dealers through a competitive bidding process by which the retail customer stated its specifications and invited bids from dealers franchised by different manufacturers. When a Volvo dealer received the customer's specifications, it contacted Volvo and requested a discount off the wholesale price. Volvo then decided, on a case-by-case basis, whether to offer a discount and, if so, what the discount would be, taking into account such factors as industry-wide demand and the retail customer's history of purchasing certain brands of trucks. The dealer then incorporated the discount offered by Volvo into its bid and purchased the trucks only if the retail customer accepted the bid.

In 1997, Volvo announced a projected reduction in the number of authorized dealers. Coincidentally, Reeder learned that Volvo had given another dealer a price concession greater than the concessions Reeder typically received. Reeder suspected that it was one of the dealers Volvo targeted for elimination. Reeder filed suit, alleging losses attributable to Volvo's purported violations of state law and the Robinson-Patman Act. Reeder prevailed at trial and on appeal to the Eighth Circuit Court of Appeals. The Supreme Court, however, reversed and remanded, concluding that "[a]bsent actual competition with a favored Volvo dealer ... Reeder cannot establish the competitive injury required under the Act." 126 S.Ct. at 870. The Supreme Court held that Reeder's proffered comparisons fell short of showing price discrimination, because in none

Trucks decision nonetheless yields important observations about the underlying policy and purpose of the Robinson-Patman Act that are relevant to the present appeal. Justice Ginsburg, writing for the majority, noted that:

> Section 2, "when originally enacted as part of the Clayton Act in 1914, was born of a desire by Congress to curb the use by financially powerful corporations of localized price-cutting tactics which had gravely impaired the competitive position of other sellers." *FTC v. Anheuser-Busch, Inc.*, 363 U.S. 536, 543, and n. 6, 80 S.Ct. 1267, 4 L.Ed.2d 1385.... Augmenting that provision in 1936 with the Robinson-Patman Act, Congress sought to target the perceived harm to competition occasioned by powerful buyers, rather than sellers; specifically, Congress responded to the advent of large chain stores, enterprises with the clout to obtain lower prices for goods than smaller buyers could demand.
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> * * *
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> Mindful of the purposes of the Act and of the antitrust laws generally, we have explained that Robinson-

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of the specific instances upon which Reeder relied did Reeder compete with beneficiaries of the alleged discrimination for the same customer. Moreover, Reeder failed to demonstrate that the compared dealers were consistently favored vis-a-vis Reeder; Reeder merely cited occasions when it competed with non-Volvo dealers for a sale to a customer. The Court noted that "[t]he Act centrally addresses price discrimination in cases involving competition between different purchasers for resale of the purchased product. Competition of that character ordinarily is not involved when a product subject to special order is sold through a customer-specific competitive bidding process." *Id.* at 866. "Here, there is no discrete 'favored' dealer comparable to a chain store or a large independent department store-at least, Reeder's evidence is insufficient to support an inference of such a dealer or set of dealers." *Id.* at 871.

Patman does not "ban all price differences charged to different purchasers of commodities of like grade and quality," *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 220, 113 S.Ct. 2578, 125 L.Ed.2d 168 (1993) (internal quotation marks omitted); rather, the Act proscribes "price discrimination only to the extent that it threatens to injure competition," *ibid.*

* * *

A hallmark of the requisite competitive injury, our decisions indicate, is the diversion of sales or profits from a disfavored purchaser to a favored purchaser. *FTC v. Sun Oil Co.*, 371 U.S. 505, 518-519, 83 S.Ct. 358, 9 L.Ed.2d 466 (1963).... We have also recognized that a permissible inference of competitive injury may arise from evidence that a favored competitor received a significant price reduction over a substantial period of time. *See FTC v. Morton Salt Co. ["Morton Salt"]*, 334 U.S. 37, 49-51, 68 S.Ct. 822, 92 L.Ed. 1196 (1948)....

126 S.Ct. at 869-70.

The *Volvo Trucks* Court further explained:

Interbrand competition, our opinions affirm, is the "primary concern of antitrust law." *Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36, 51-52, n. 19, 97 S.Ct. 2549, 53 L.Ed.2d 568 (1977). The Robinson-Patman Act signals no large departure from that main concern. Even if the Act's text could be construed in the manner urged by Reeder and embraced by the Court of Appeals, we would resist interpretation geared more to the protection of existing competitors than to the stimulation of competition. In the case before us, there is no

> evidence that any favored purchaser possesses market power, the allegedly favored purchasers are dealers with little resemblance to large independent department stores or chain operations, and the supplier's selective price discounting fosters competition among suppliers of different brands.... By declining to extend Robinson-Patman's governance to such cases, we continue to construe the Act "consistently with broader policies of the antitrust laws." *Brooke Group*, 509 U.S. at 220, 113 S.Ct. 2578, 125 L.Ed.2d 168 (quoting *Great Atlantic & Pacific Tea Co. v. FTC*, 440 U.S. 69, 80, n. 13, 99 S.Ct. 925, 59 L.Ed.2d 153 (1979))....

Id. at 872-73 (footnote omitted).

The Supreme Court's discussion in *Volvo Trucks* regarding the underpinnings of the Robinson-Patman Act serves as a backdrop for our evaluation of plaintiffs' secondary-line price discrimination claim. As the *Volvo Trucks* Court explained and this court has noted, the Robinson-Patman Act was originally enacted in part to "prohibit all devices by which large buyers gained discriminatory preferences over smaller ones by virtue of their greater purchasing power," *Lewis v. Philip Morris, Inc.*, 355 F.3d 515, 520 (6th Cir. 2004), and, hence, it is well established, in the context of quantity discounts, that an inference of competitive injury arises from "evidence that some purchasers had to pay their supplier 'substantially more for their goods than their competitors had to pay.'" *Texaco, Inc. v. Hasbrouck*, 496 U.S. 543, 559, 110 S.Ct. 2535, 110 L.Ed.2d 492 (1990) (quoting *Morton Salt*, 334 U.S. at 46-47, 68 S.Ct. 822).

The WPP, however, is not a quantity discount program; rather, its market-share targets are calculated using a percentage of its savings brand sales rather than a designated

quantity, thus distinguishing it from volume discount programs. Such market-share discount pricing structures present different concerns than volume-based discounts. Market-share discounts theoretically level the playing field by allowing competing purchasers of like commodities to participate on equal terms, regardless of size, because such discounts depend not on volume purchases, but on the percentage of purchases of a particular category of products.

There is a dearth of precedent addressing the legality of market-share discount programs under the Act; heretofore, legal challenges to secondary-line pricing practices under § 13(a) have arisen in the original context contemplated by the Act – discriminatory pricing arising from standard quantity discounts. We nonetheless would be remiss if we were to suggest that market-share discounts are immune from Robinson-Patman scrutiny. It is certainly conceivable that under certain circumstances, as alleged here by plaintiffs, market-share discounts could be administered in such a manner that such incentives cross the fine line from pro-competitive incentives to exclusionary, anti-competitive price discrimination. Indeed, the Supreme Court has noted that price discrimination may arise under various pricing structures, not limited to volume-based discounts:

> While, as noted, the immediate and generating cause of the Robinson-Patman amendments [to the Clayton Act] may have been a congressional reaction to what were believed to be predatory uses of mass purchasing power by chain stores, neither the scope nor the intent of the statute was limited to that precise situation or set of circumstances. Congress sought generally to obviate price discrimination practices threatening independent merchants and businessmen, presumably from whatever source.

FTC v. Sun Oil Co., 371 U.S. 505, 520, 83 S.Ct. 358, 9 L.Ed.2d 466 (1963). *See also Alan's of Atlanta, Inc. v. Minolta Corp.*, 903 F.2d 1414, 1422 n.16 (11th Cir. 1990) ("Though the birth of the RPA was motivated by a desire to place 'big' purchasers on par with 'small' ones, the Act's applicability is not limited to big buyer/small buyer cases.... It is one of general applicability and prohibits discriminations generally." (internal citations and quotation marks omitted)).

Consequently, the Supreme Court has prescribed a case-by-case evaluation of antitrust claims: "Legal presumptions that rest on formalistic distinctions rather than actual market realities are generally disfavored in antitrust law. This Court has preferred to resolve antitrust claims on a case-by-case basis, focusing on the particular facts disclosed by the record." *Eastman Kodak Co. v. Image Technical Servs., Inc.*, 504 U.S. 451, 466-67, 112 S.Ct. 2072, 119 L.Ed.2d 265 (1992) (internal quotation omitted). In sum, regardless of the mechanics of a pricing structure, if there is evidence of discrimination in price between different purchasers of the same commodities, and if the effect of that discrimination may be to substantially lessen competition, then there is a prima facie violation of the Robinson-Patman Act.

B.

"'[A] price discrimination within the meaning of [§ 13(a)] is merely a difference in price.'" *Texaco, Inc.*, 496 U.S. at 558, 110 S.Ct. 2535 (quoting *Anheuser-Busch, Inc.*, 363 U.S. at 549, 80 S.Ct. 1267). This fundamental, understated principle is by no means simplistic. Although the Robinson-Patman Act "proscribes unequal treatment of different customers in comparable transactions," *FTC v. Borden Co.*, 383 U.S. 637, 643, 86 S.Ct. 1092, 16 L.Ed.2d 153 (1966), "Congress did not intend to outlaw price differences that result from or further the forces of competition[,]" and the Act "should be construed consistently

with broader policies of the antitrust laws." *Brooke Group*, 509 U.S. at 220, 113 S.Ct. 2578 (quotation omitted). The Act "do[es] not bar a distributor from ever offering lower prices or discounts; instead, [it] prohibit[s] distributors from discriminating among purchasers in doing so." *Krist Oil Co., Inc. v. Bernick's Pepsi-Cola of Duluth, Inc.*, 354 F.Supp.2d 852, 856 (W.D. Wis. 2005) (citing *Borden*, 383 U.S. at 646, 86 S.Ct. 1092). Thus, a manufacturer may utilize promotional arrangements and provide financial incentives to favor its product or even to disfavor competing brands, and manufacturers need not "guarantee that all customers benefit to the same degree," *Comcoa, Inc. v. NEC Tel., Inc.*, 931 F.2d 655, 664 (10th Cir. 1991). Indeed, by definition, an incentive-based program will lead to different outcomes for different purchasers. Incentives and concessions provide greater benefits to those purchasers who choose to align their own competitive objectives with those of their supplier. Commitment to a particular product is the sine qua non of an incentive program. *Precision Printing Co. v. Unisource Worldwide, Inc.*, 993 F.Supp. 338, 352 (W.D. Pa. 1998).

C.

In an effort to better define the parameters of "a difference in price" in secondary-line price discrimination claims under § 13(a), numerous courts, including this court and the district court herein, have utilized the doctrine of "functional availability," a theory that "'is a judicial graft on § 2(a) and is not explicitly embodied in the text of the statute.'" *Metro Ford Truck Sales, Inc. v. Ford Motor Co.*, 145 F.3d 320, 326 (5th Cir. 1998) (quoting *Precision Printing Co.*, 993 F.Supp. at 350).[9] "According to this court-

[9] "By statute, an otherwise illegal discriminatory payment for, or furnishing of, services or facilities is permissible if made available on proportional terms to all purchasers. 15 U.S.C. §§ 13(d), (e). Section

created rule, the plaintiff in a Robinson-Patman Act suit cannot recover damages for lower prices paid by its competitors to the defendant if those same prices were available to the plaintiff from a practical standpoint and on equal terms with its competitors." *Amer. Tara Corp. v. Int'l Paper Co.*, No. 79C1470, 1981 WL 375752, at *1 (N.D. Ill. July 30, 1981) (unpublished).[10] The rationale underlying the doctrine is that functional availability negates two essential elements of a § 13(a) claim: "Where a purchaser does not take advantage of a lower price or discount which is functionally available on an equal basis, it has been held that either no price discrimination has occurred, or that the discrimination is not the proximate cause of the injury." *Shreve Equipment, Inc. v. Clay Equip. Corp. ["Shreve"]*, 650 F.2d 101, 105 (6th Cir. 1981). *See also Amer. Tara Corp.*, 1981 WL 375752 at *2 ("If the lower prices afforded its competitor were equally available to the plaintiff, any discrimination and competitive advantage suffered by the plaintiff is attributed not to the defendant's program but to the plaintiff's failure to take advantage of its opportunity to receive those prices.").

Plaintiffs maintain that functional availability is an affirmative defense, with the burden of proof placed squarely

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13(a) contains no comparable language, but the 'functional availability' [doctrine] has been judicially extended to that section." *Allied Sales and Serv. Co. v. Global Indus. Tech., Inc.*, No. Civ. A. 97-0017-CB-M, 2000 WL 726216, at * 17 (S.D.Ala. May 1, 2000) (unpublished).

[10] The doctrine of functional availability is not to be confused with the issue of "functional discounts"-*i.e.*, discounts based upon a particular marketing or distribution function, such as warehousing or delivery services, performed by the customer receiving the discount. *See Texaco, Inc.*, 496 U.S. at 571, 110 S.Ct. 2535 ("A functional discount that constitutes a reasonable reimbursement for the purchaser's actual marketing functions will not violate the Act.").

on defendant to show that RJR's favored price was practically available to all customers. Although several courts have referred to functional availability as a "defense," *see Comcoa, Inc.*, 931 F.2d at 664, *DeLong Equip. Co. v. Washington Mills Abrasive Co.*, 887 F.2d 1499, 1516 (11th Cir. 1989), *Allied Sales and Serv. Co.*, 2000 WL 726216 at *17, *Calumet Breweries, Inc. v. G. Heileman Brewing Co.*, 951 F.Supp. 749, 753-55 (N.D. Ind. 1994), and *Cain v. Chevron U.S.A., Inc.*, 757 F.Supp. 1120, 1123 (D. Ore. 1991), we agree with the Fifth Circuit Court of Appeal's assessment, obviously shared by this court in *Shreve*, that functional availability "is technically not an affirmative defense, but the negation of an element of the plaintiff's case." *Metro Ford Truck Sales, Inc.*, 145 F.3d at 326 n.17 (citing Kintner & Bauer, 3 *Federal Antitrust Law*, § 25.7 (1983)). *See also Sweeney & Sons, Inc. v. Texaco, Inc. ["Sweeney"]*, 637 F.2d 105, 120 (3d Cir. 1980) ("[A] uniform pricing formula applicable to all customers is not a price discrimination under the act[,]" if the favorable "price was available, not only in theory but in fact, to all purchasers."); *Precision Printing Co.*, 993 F.Supp. at 350 ("Although often referred to as a defense, [functional availability] really is not a defense at all...."). Consequently, if an essential element of the plaintiff's case (*i.e.*, discrimination in price between purchasers of like commodities) is negated by evidence showing that a pricing or discount scheme is functionally available to all participants on an equal basis, summary judgment is appropriate. If, however, proof has been made that there has been discrimination in price, then "§ 2(b) of the Act specifically imposes the burden of showing justification upon one who is shown to have discriminated in prices." *Morton Salt*, 334 U.S. at 45, 68 S.Ct. 822.

From a practical standpoint, the doctrine of functional availability "is, where quantity discounts are concerned,

nothing more than judicial recognition that 'cheaper by the dozen' is a too well-accepted practice of commerce to be anti-competitive in every instance." *Calumet Breweries, Inc.*, 951 F.Supp. at 753.

The doctrine of "functional availability" stems from *Morton Salt,* in which the Supreme Court deemed a volume discount program to be illegal under the circumstances because the manufacturer set the minimum purchase requirement so high that it was impossible for small buyers to obtain the discounts received by large buyers. In so holding, the Court noted that "[t]heoretically, these discounts are equally available to all, but functionally they are not." *Morton Salt,* 334 U.S. at 42, 68 S.Ct. 822.

This court has applied the functional availability doctrine in two cases in which the plaintiffs challenged volume discounts under § 13(a). In *Shreve,* the plaintiff, a farm equipment retailer, brought suit against the defendant manufacturer, alleging price discrimination due to its preclusion from the defendant's volume discount plan. 650 F.2d at 102. The defendant offered the volume discount to all of its dealers on a sliding scale – the more equipment a dealer purchased during the year, the higher the percentage of discount it received at the end of that year. The plaintiff's president, who was also its primary stockholder, voluntarily signed a contract to act as the territorial manager for the defendant and thereby received special advantages which were unavailable to other dealers. The contract also contained a condition that the acceptance of such employment would prevent the plaintiff from receiving the volume discount given to other dealers. The *Shreve* Court held that, under the circumstances, the plaintiff's president clearly understood that the plaintiff would not receive the discount. Therefore, it was not the existence of the discount program which caused the plaintiff's alleged injury, but the

president's voluntary choice of an employment relationship with the defendant which caused the loss of the discount. Under such circumstances, "[t]he discount was functionally available to Shreve but it chose not to take advantage of the discount plan. Therefore, the discount plan was not the proximate cause of any alleged injury suffered by Shreve." *Id.* at 107. Accordingly, the *Shreve* Court reversed, in pertinent part, a judgment awarded to the plaintiff.

In *Bouldis,* the plaintiff, Bold-Morr, Inc., a former Suzuki motorcycle dealership, appealed a summary judgment dismissing its claims that the defendant manufacturer Suzuki's promotional programs and business policies constituted forms of price discrimination in violation of the Robinson-Patman Act. Suzuki maintained that participation in its programs was contingent upon a dealer's overall credit worthiness and presented evidence that its adverse credit decisions with respect to the plaintiff were based upon Bold-Morr's poor financial condition. The testimony of the plaintiff's officer indeed indicated that he experienced cash flow and inventory problems which, at various times, prevented him from participating in the promotional sales. In affirming the district court's order granting summary judgment, this court stated:

> The practice of conditioning price concessions and allowances upon the customer's purchase of a specific quantity of goods will not give rise to a Robinson-Patman violation if the concessions are available equally and functionally to all customers.... Further, a claim of price discrimination will not lie if the buyer failed to take advantage of a price concession which was realistically and functionally available. *See Shreve Equipment, Inc., supra,* 650 F.2d at 105. The legislative history reveals that the aim of the Act is to prevent a large buyer from

gaining discriminatory preferences over the small buyer solely because of the large buyer's greater purchasing power. *See Federal Trade Comm. v. Henry Broch & Co.*, 363 U.S. 166, 168-69, 80 S.Ct. 1158, 4 L.Ed.2d 1124 (1960); *Morton Salt Co., supra,* 334 U.S. at 43, 68 S.Ct. 822[.]

In granting summary judgment on this claim, the district court found that the various concessions and allowances made available by Suzuki's promotional programs were practically and realistically available to Bold-Morr. We agree. A review of the record demonstrates that the purchasing conditions imposed were well within the means of the average Suzuki dealer.

* * *

It is also important to note that the promotional packages were intended to enhance the sale of products to dealers by providing economic incentives to purchase the promoted models. Moreover, Suzuki did not expect a dealer to participate in every promotional program. It was a matter of discretion with each dealer, in the exercise of its business judgment, whether to take advantage of the promotion. Appellant Pete Bouldis testified that on some occasions he participated in the promotional programs and at other times he did not, despite the fact that he had the financial ability to do so. Bouldis testified that he had cash flow and inventory problems which prevented him, at times, from participating in the promotional sales. Accordingly, by appellant's own admission, there is no causal link between Suzuki's practices and appellant's alleged injuries. *See generally,* 16C Von Kalinkowski, *[Business Organizations], supra,* at § 31.01[5][c] [(1982)].

> Accordingly, we conclude that Suzuki's promotional programs were equally and functionally available to Bold-Morr, and, therefore, § 2(a) of the Clayton Act, as amended, was not violated.

Bouldis, 711 F.2d at 1326-27.

The courts of other circuits have likewise determined the viability of § 13(a) secondary-line price discrimination claims by using the functional availability doctrine. For instance, in *Sweeney,* the defendant oil company, Texaco, sold its gasoline to various wholesale distributors, including the plaintiff. When Texaco unilaterally altered the location where the plaintiff could load his delivery trucks with defendant's gasoline, causing the plaintiff to incur higher distribution costs and eliminate its locational advantage, the plaintiff filed suit, claiming that this action was tantamount to discriminatory pricing in violation of the Robinson-Patman Act. The Third Circuit Court of Appeals, citing *Morton Salt* and noting that price discounts must be available not only in theory, but in fact, to all purchasers, held that the plaintiff had failed to establish that the hauling allowance formula constituted unlawful price discrimination under § 13(a):

> In the case before us, it is the distributors, not Texaco, who determine where to place their bulk storage plants, and it is the distributors, not Texaco, who decide which retail stations they will supply. Texaco has no control over those decisions; it calculates the hauling allowance solely on the bulk plant's location in relation to the nearest pickup point. On this record, we cannot conclude that Texaco's formula forecloses any distributor from an advantageous hauling allowance. The record also fails to show that small buyers, whom the act was primarily intended to protect, are disadvantaged by the formula.

Sweeney, 637 F.2d at 121.

In *Krist Oil Co.*, the defendant supplied the plaintiff's retail outlets with Pepsi products. The plaintiff claimed that the defendant engaged in price discrimination because it linked its price to the retailer to the retailer's price to its customers. The plaintiff had chosen to increase its retail price on Pepsi to pay for certain capital investments, which then led the defendant to charge the retailer a higher price. In granting the defendant's motion to dismiss the Robinson-Patman allegations for failure to state a claim, the court rejected the plaintiff's argument that the pricing structure was functionally unavailable to it, finding instead that "the lowest case price is unavailable to plaintiff not because of its disproportionately small purchasing power but because of other unrelated investments plaintiff made." *Krist Oil Co.*, 354 F.Supp.2d at 857. The court noted that the plaintiff faced a choice that was "not an inequity imposed by the pricing structure but a fundamental economic conundrum faced by all sellers," *i.e.*, "purchasers are left with a choice between selling more bottles at a lower per bottle profit or selling fewer bottles at a higher profit for each." *Id.* The district court added, "It is curious that plaintiff has instituted a lawsuit seeking to free itself from the shackles of lower profits." *Id.*

In *Capital Ford Truck Sales, Inc. v. Ford Motor Co.*, 819 F.Supp. 1555 (N.D.Ga. 1992), the court held that there was no violation of § 13(a) of the Robinson-Patman Act when the defendant manufacturer offered special discount incentives for trucks remaining in inventory at its plant, without applying the discount to vehicles that were in dealer stock at the time the incentives were announced, where the discounts on the manufacturer's inventory were made available to the complaining plaintiff dealership on an equal basis with other dealers, and discounts were not applied retroactively to

trucks held in any other dealer's inventory. 819 F.Supp. at 1571. The court further held that the defendant's pricing system, which granted standard quantity discounts and conditioned price concessions on the number of trucks a dealer sold in a single transaction, did not give rise to price discrimination where the discounts were functionally and realistically available to all customers:

> Ford Motor avers in its motion for summary judgment that the maximum purchase quantity discounts ... were realistically available to all dealers.
>
> Plaintiffs respond by adducing evidence which indicates that, because Capital Ford was not selling to large quantity purchasers, it did not qualify for the maximum price assistance under the [discount] program. This appears, however, to be the result of a marketing decision by Capital Ford to concentrate on sales to smaller volume customers as opposed to large fleet purchasers. Plaintiffs do not allege that Defendant in any way restricted the customers to whom Capital Ford could sell, and Plaintiffs have adduced absolutely no evidence that the purchase quantity discounts offered under the [discount] program were not realistically available to all dealers if they chose to bid larger volume buyers. *See Bouldis,* 711 F.2d at 1326; *Shreve Equipment,* 650 F.2d at 105.

Id. at 1578-79.

Finally, in *American Tara Corp.,* the defendant paper company, which produced a type of tissue paper used for one-time carbon paper, initiated a discount program based upon a percentage of past purchases of its product rather than a specific quantity. 1981 WL 375752 at *1. If, in 1978 or 1979, a manufacturer purchased from defendant an amount of tissue equal to 25% of the total tissue it purchased from all

suppliers in 1977, that manufacturer would receive a 2.5% rebate on all of its one-time carbonizing tissue purchases from defendant during 1978 or 1979; a purchase of 26-40% of its 1977 purchase total from defendant in 1978 or 1979 would result in a percentage rebate based on a sliding scale. 1981 WL 375752 at * 1. The program further provided that a manufacturer who expressed an intention to participate in the program would not be affected by price increases during the program. The plaintiff manufacturer did not qualify for the rebate and brought suit alleging price discrimination against the defendant pursuant to § 2(a), arguing that the defendant's rebate program was not functionally available to it "not because, as in *Morton Salt,* plaintiff was too small to buy the amount necessary to qualify for a rebate but because plaintiff could not buy that amount from defendant without placing itself in extreme jeopardy." *Id.* at *2. Citing *Sweeney* and *Shreve,* the district court nonetheless upheld the pricing formula and granted summary judgment in favor of the defendant, stating:

> Although this dispute over the repercussions of choosing to participate in the program creates an issue of fact, the issue is not material and does not preclude granting summary judgment. Even if the facts were as plaintiff states, defendant did not discriminate against plaintiff. The factors which plaintiff claims made the program disadvantageous to plaintiff are not unique to plaintiff. If in 1978 plaintiff could not have bought from defendant 25% of the amount it bought from all suppliers in 1977 "without placing itself in extreme jeopardy," plaintiff's competitors could not have bought that percentage from defendant without taking the same risk. Defendant's program may have been, as plaintiff argues, a bad bargain. As long as defendant offered the same bad bargain to plaintiff as

to its competitors, however, defendant did not violate the Robinson-Patman Act.

* * *

The holdings in [*Shreve* and *Sweeney*] reflect the rationale for the functional availability defense and control our holding in this case. The plaintiffs in those cases and in this case could have qualified to receive the lower prices but chose based on their business judgment, to suffer competitive injury if their competitor's purchased at the lower price rather than assume the disabilities or risks in the commitment necessary to purchase at the lower price. Since plaintiff's competitors had to make the same decision, Tara's choice, not defendant's program, was responsible for the price discrimination. Therefore, the rebates which defendant gave plaintiff's competitors were functionally available to plaintiff and did not violate the Robinson-Patman Act.

Id. at *3.[11]

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[11] *See also Metro Ford Truck Sales,* 145 F.3d at 326 (Fifth Circuit Court of Appeals held that wholesale discount program, offered by the defendant manufacturer to all of its authorized truck dealers to help with bidding for large volume purchasers, did not constitute unlawful price discrimination because program was in fact, and not merely theoretically, available to all dealers and the plaintiff conceded that the discounts were available to it on an equal basis with other Ford dealers); *Comcoa, Inc.,* 931 F.2d at 664 (Tenth Circuit Court of Appeals held that availability "defense" applied to special volume discounts offered on technologically obsolescent equipment; court approved jury instruction that stated for the availability doctrine to apply, "the implementation of a discount program need not guarantee that all customers benefit to the same degree as other customers, as long as the program is evenly administered"); *Hunt-Wesson Foods, Inc. v. Ragu Foods, Inc.,* 627 F.2d 919, 929 (9th Cir. 1980) (summary judgment proper where it was undisputed that defendant manufacturer made contested discounts "equally available to any

Conversely, other courts have held that, under certain circumstances, pricing mechanisms may render a quantity discount practically unavailable to the plaintiff. *See DeLong Equipment Co.*, 887 F.2d at 1516-17 (citing *Shreve* and acknowledging the functional availability doctrine, but reversing district court order granting summary judgment to defendant manufacturer where the plaintiff distributor presented substantial evidence that it was not given an opportunity to buy the "special" lower-priced item); *Allied Sales and Serv. Co.*, 2000 WL 726216 at *18 (denying summary judgment to the defendant where issues of fact existed as to whether the challenged repair discount was functionally available to the plaintiff, *i.e.*, what the criteria for discount actually were and whether the plaintiff knew about the discount); *Caribe BMW, Inc. v. Bayerische Motoren Werke Aktiengesellschaft*, 19 F.3d 745, 752 (1st Cir. 1994) (reversing district court's order dismissing complaint for failure to state a claim where allegations that the plaintiff retailer did not know that its competitors were receiving favored treatment from the defendant manufacturer were sufficient to establish that favored treatment was not functionally available: "[W]e do not see how ordinarily one could say that a seller has made favored treatment 'available'

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qualified purchaser in any market"); *FLM Collision Parts, Inc. v. Ford Motor Co.*, 543 F.2d 1019, 1024-25 (2d Cir. 1976) ("[W]hile the incentive payment plan did not set a single uniform price for all types of sales made by Ford to its dealers, it was administered with an even hand, without any discrimination among the dealers who purchased from Ford."); *Rod Baxter Imports, Inc. v. Saab-Scania of America, Inc.*, 489 F.Supp. 245, 247 (D.Minn.1980) (no price discrimination occurred where bonus payments under Sell-a-Bration sales incentive program were "available on a reasonably equivalent basis to all dealers who made the commitment to obtain them" and the failure of some dealers to reach their quotas was the result of factors other than program, such as low inventory, poor financing, reduced sales forces, and poor management).

to a disfavored customer if the disfavored customer *does not know* about the favored treatment."); *Calumet Breweries, Inc.*, 951 F.Supp. at 754-55 (in the context of granting a preliminary injunction, concluding that there was ample evidence that volume discount was only theoretically, but not functionally, available to the plaintiff because retroactive quantity adjustments in effect resulted in a secret discount that only the favored wholesaler could obtain, and the defendant handicapped the plaintiff by limiting the array of product choices available to it and by imposing restrictive inventory requirements); *Nat'l Dairy Prod. Corp. v. FTC*, 395 F.2d 517, 523 (7th Cir. 1968) (affirming Federal Trade Commission order requiring dairy distributor to cease unlawful price practices where evidence showed that discriminatory quantity discounts favoring chain store customers and "[w]e also cannot accept National's argument that the disfavored independents should have joined voluntary or cooperative groups and thus obtained higher discounts.").

As reflected in the above cases, the functional availability doctrine has been applied historically in the context of quantity discounts, yet its underlying rationale-that a discount equally and realistically available to all purchasers of a like commodity does not constitute discrimination in price within the meaning of § 13(a) – is no less relevant in judging the legality of market-share discount formulas such as the WPP.

The doctrine seemingly defies the logic that a rational purchaser of goods will always seek to obtain the best discount or concession that is available to it; if a higher discount is realistically and practically available, why would a reasonable purchaser *not* take advantage of the best possible price? However, the functional availability doctrine reflects the realities of the marketplace and recognizes that

purchasers in competitive markets, particularly multi-brand distributors or wholesalers, must make difficult economic choices, prioritize brand sales and often decline conditional discounts for reasons unrelated to their actual ability to obtain them. Thus, as reflected in the above cases, the courts have refused to find price discrimination under § 13(a) when the purchaser's decision or capacity to take advantage of the best discount made "available on a reasonably equivalent basis to all dealers who made the commitment to obtain them," *Rod Baxter Imports, Inc.*, 489 F.Supp. at 249, was determined by elements within its control – *i.e.*, unrelated investments *(Krist);* poor credit ratings *(Bouldis);* management issues, inventory decisions, or marketing strategies (*i.e.*, *Shreve, Capital Ford* and *Sweeney);* or a decision to promote the competitor's product *(Amer. Tara Corp.)* – and not by disproportionately small purchasing power or the pricing structure itself.

The doctrine also underscores the fact that the Robinson-Patman Act neither ensures success nor excuses purchasers from making difficult decisions about which competing brands to carry, market, or promote:

> In any competitive economy we cannot avoid injury to some of the competitors. The law does not, and under the free enterprise system it cannot, guarantee businessmen against loss. That businessmen lose money or even go bankrupt does not necessarily mean that competition has been injured. H.R.Rep. No. 1422, 81st Cong., 1st Sess. 5-6.

Sun Oil Co., 371 U.S. at 519, 83 S.Ct. 358.[12]

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[12] Plaintiffs cite the *Caribe, Calumet Breweries*, and *National Dairy* decisions for the proposition that, pursuant to § 13(a), a seller cannot legally condition price concessions on self-damaging sacrifices by a

buyer, particularly where sacrifices of equal magnitude would not be required of the buyer's more favored competitors. However, we find these cases to be inapposite to the present circumstances. All of these cases involved inherently suspect volume discounts which permitted large buyers to secure a competitive advantage over a small buyer because of the large buyer's quantity purchasing ability. In *Caribe,* allegations that the plaintiff retailer did not know that its competitors were receiving favored treatment from the defendant manufacturer were sufficient to establish that the favored treatment was unavailable to the retailer so as to allow a claim to proceed under § 13(a). Contrary to the present plaintiffs' assertion, the case did not turn upon the plaintiff's argument that it should not be required to give up various advantages of its importer's contract. Rather, the *Caribe* court specifically declined to endorse that argument and made clear that "if a seller makes its favorable prices and terms available to an otherwise disfavored customer, that customer has no legal right to complain." 19 F.3d at 751.

The present case bears little resemblance to *Calumet Breweries, Inc.*, a case of "blatantly discriminatory" favoritism, where the defendant supplier structured its volume discount program to specifically favor its largest customer, by effectively granting a secret discount, imposing inventory restrictions, and limiting the array of products available to the disfavored customer. 951 F.Supp. at 754. Noting that, pursuant to *Morton Salt,* an inference of competitive injury arises from any quantity discount, the court stated, "[n]othing in the Robinson-Patman Act or the cases interpreting it suggests that [the disfavored purchaser's] decision to emphasize other brands and remain a (relatively) small seller of [the defendant's] products *ipso facto* means [the defendant] may charge [the disfavored purchaser] a higher price." *Id.* at 755. As noted by Barbara O. Bruckman in *Discounts, Discrimination, and Exclusive Dealing: Issues Under the Robinson-Patman Act,* 68 Antitrust L.J. 253, 270 (2000), *Calumet* "should not be read to weaken the general principle that if a customer can take advantage of a discount but chooses for its own reasons not to do so, the seller is not later liable under Section 2(a) for losses that the customer may suffer by virtue of that choice."

Finally, in *National Dairy,* the Seventh Circuit Court of Appeals held that an order of the Federal Trade Commission requiring a dairy product distributor using volume discount schedules in various states to cease unlawful price practices was not an abuse of discretion, noting that "[w]e also cannot accept National's argument that the disfavored independents

Here, the district court, acknowledging this court's *Bouldis* and *Shreve* decisions, applied the functional availability doctrine to the present circumstances, concluding that summary judgment in favor of RJR was warranted because the undisputed evidence demonstrated that the WPP program was nondiscriminatory, evenly administered, and therefore functionally available on an equal basis to all of RJR's direct distributors. Plaintiffs dispute this conclusion.[13]

IV.

A.

Despite the fact that the SOS formula of the WPP is uniformly applied to all of RJR's wholesale distributors,

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should have joined voluntary or cooperative groups and thus obtained higher discounts. The Robinson-Patman Act does not force them to sacrifice their independence." 395 F.2d at 523. The present case, unlike *National Dairy*, neither involves a volume discount nor avers that plaintiffs must join forces and sacrifice their independence in order to protect themselves from large distributors.

In sum, none of these cases support plaintiffs' assertion that § 13(a) does not require them to change their business structure, reconfigure their customer base, or undertake an expensive and risky business plan. To the contrary, a discount program may be functionally available even when the choice "would have threatened [the plaintiff's] very existence," *Amer. Tara*, 1981 WL 375752 at *2, or when the choice "would not be economically possible." *The Iams Co. Litigation*, No. C-3-90-014, 1992 WL 1258514, at *2 (S.D. Ohio July 24, 1992) (unpublished).

[13] To the extent plaintiffs argue that the district court's order granting summary judgment in favor of defendant is improper because it is inconsistent with the court's earlier preliminary injunction ruling, this argument is without merit. It is well established that "[t]he purpose of a preliminary injunction is simply to preserve the status quo; thus, findings of fact and conclusions of law made by a district court in granting a preliminary injunction are not binding at a trial on the merits." *United States v. Edward Rose & Sons*, 384 F.3d 258, 261 (6th Cir. 2004).

plaintiffs nonetheless maintain that the WPP results in price discrimination because the share targets are grossly inflated, arbitrary, unrealistic, and impossible for plaintiffs to meet. Plaintiffs broadly claim that they are pawns in RJR's battle against fourth-tier cigarette manufacturers and that RJR, rather than compete lawfully against its fourth-tier competition by lowering prices on certain of its cigarette brands, adopted the WPP in 2000 to foreclose distributors from selling fourth-tier brands altogether to their retail customers. Such sweeping complaints about the cigarette industry are, however, not the appropriate focus of this secondary-line price discrimination suit.

More to the point, plaintiffs allege that the WPP disfavors them because, unlike RJR's other distributors, they operate largely in rural "low-end" segments of the market where their retail customers demand fourth-tier brands, and RJR does not price any of its brands at the fourth-tier price level. The gravamen of plaintiffs' price discrimination claim is set forth in ¶¶ 26-28 of their Fifth Amended Complaint, in which plaintiffs aver:

26.

> In August 2000, in response to competition from lower-priced 4th tier cigarette manufacturers, RJR dramatically changed the discount pricing structure of its products for its distributors by implementing the WPP. The WPP set up three separate price tiers for distributors, Levels 1, 2, and 3. Under the WPP, if a distributor's sales of RJR "value priced" brands, as compared with its sales of 4th tier brands and the value priced brands of other manufacturers, do not meet a predetermined goal in terms of RJR market share of sales, the pricing structure penalizes such distributors on their net (discounted) price. RJR does not price any of its cigarettes at the 4th tier level.

This scheme by RJR is aimed at coercing distributors to limit sales of 4th tier brands and other competitors' brands, and designed to force sales of RJR products at higher prices. In implementing the WPP, RJR set the standard for the best discount and back-end monies at such an extreme level that for an overwhelming majority of distributors, including Plaintiffs, the WPP's best price could never be achieved.

27.

RJR's products are indispensable to Plaintiffs' wholesaler business because their customers (*i.e.*, retail stores) demand that the wholesaler carry a full range of tobacco products so that they can buy all manufacturers' cigarettes from one wholesaler. However, because Plaintiffs service retailers who sell to poorer consumers, they must offer cheaper 4th tier cigarettes to compete as a distributor. This has resulted in [the] inability to obtain the WPP's best price from RJR. Plaintiffs are forced to compete directly against distributors receiving substantially better prices and whose markets overlap with various portions of Plaintiffs' markets. Critically, Plaintiffs have no significant control over consumer demand, and cannot reduce their sales of 4th tier cigarettes, or other RJR competitors' products, without losing retailer customers. Given Plaintiffs' customers and market for sales, the best price under RJR's WPP is impossible for them to achieve.

28.

Through the WPP, RJR penalizes distributors, including Plaintiffs, who sell 4th tier and other RJR competitors' cigarettes, by reducing allowed discounts and back-end monies as a means of preventing them from distributing cigarettes of RJR's

> competitors. As a result, Plaintiffs must pay substantially more than their own competitors for the same RJR products, which places Plaintiffs at a severe competitive disadvantage and has resulted in substantial competitive injury.

The WPP's pricing formula thus purportedly places plaintiffs in a no-win situation-either accede to RJR and destroy their business or meet customer demands and attempt to absorb RJR's discriminatory price differences while suffering debilitating lost profits. Plaintiffs contend that the alleged price disadvantage instigated by the WPP "has caused Plaintiffs to experience millions of dollars in lost profits," and has "caused a loss of customers and threatened the viability of Plaintiffs' businesses." (Complaint, ¶ 29). According to plaintiffs, the "very existence" of the allegedly favored competitors is not similarly threatened because these competitors have a pre-existing "higher-end" customer base that does not demand fourth-tier cigarettes, thus allowing the competitors to qualify for the WPP's best prices.

In response, defendant contends that its best price is as functionally available to each plaintiff as it is to any of that plaintiff's competitors and the relative size of the competitors is irrelevant because all are treated the same in a market-share-based program. Defendant posits that plaintiffs have a choice, albeit difficult: either they can attempt to attain defendant's marketing goals by curtailing their sales of fourth-tier cigarettes or they can continue to promote fourth-tier cigarettes and receive a lower discount on defendant's products.

Plaintiffs counter that this purported "choice" is unpalatable – because most retailers prefer to buy their stock from a single distributor, if plaintiffs curtail the sale of fourth-tier cigarettes, their customers will take their entire business elsewhere. Thus, dropping competitor products

from inventory would result in an immediate loss of customers because they operate as full-line, full-service distributors. Plaintiffs maintain that "§ 2(a) does not require buyers to attempt ... to drastically change their business structure and radically reconfigure their customer base in order to avoid price discrimination, particularly when such an expensive and risky business plan would lead at best to massive losses."

Plaintiffs further assert that genuine issues of material fact exist regarding whether the WPP's best discounts were functionally available to them, first arguing that in granting summary judgment, the district court erroneously concluded that plaintiffs' "inability to take advantage of the best discount" was because of "an outside influence, not in the control of RJR...." Plaintiffs maintain that in so holding, the district court failed to recognize that the WPP's principal mechanism of discrimination-grossly inflated share targets-is solely within RJR's control.[14]

In this regard, plaintiffs presented evidence allegedly showing that in the first quarter of 2003, the WPP's Level 2H share target in states where plaintiffs conduct their business exceeded RJR's alleged state savings brands market share in

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[14] Plaintiffs also suggest that the district court's pronouncement in this regard fails as a matter of law to the extent it suggests that factors outside of the seller's (RJR's) control, such as consumer demand, are irrelevant to the functional availability issue. Otherwise stated, although plaintiffs agree that certain circumstances solely within the buyer's control, such as poor credit, *see Bouldis,* 711 F.2d at 1325, cannot render a program functionally unavailable, *any circumstances not within the buyer's control* are relevant to a determination whether the qualifications for the best price can be met as a functional or practical matter. Plaintiffs maintain that none of the circumstances making the WPP's best prices functionally unavailable in the instant matter are within plaintiffs' control.

such states and that RJR's market-share figures used for the WPP calculations were inflated above RJR's actual state market share. The Level 2H target was, according to plaintiffs, as much as 22.5 points higher than RJR's actual market share in the pertinent areas. Plaintiffs allege that RJR's representation that the WPP share target was set around 30% below RJR's actual savings brands state share is deceptive, because the particular target used as the basis for this computation is the Level 2A target, the second worst of ten price levels, and thus it would not entitle a distributor to RJR's best discounts.

Plaintiffs' economic expert opined that RJR's best prices were not practically available to most distributors, including all plaintiffs. Nine of the original plaintiffs competed against Level 2H distributors, ten plaintiffs competed against Level 2G distributors, and one plaintiff competed against Level 2F distributors. From the second quarter 2002 through the third quarter 2003, only 7-8% of RJR's 700 direct distributors reached their Level 2H targets under the WPP. During this same time period, only an additional 4% of RJR distributors achieved Level 2G or higher, and only an additional 6.5% of RJR distributors reached Level 2F or higher. Most distributors failed to reach even Level 2C or higher. Plaintiffs claim that this inability of over 90% of RJR wholesalers to achieve the WPP's best price applies throughout the complaint period. Consequently, plaintiffs maintain that a share target set well in excess of RJR's actual market share is not "well within the means of the average" distributor, *Bouldis*, 711 F.2d at 1326, and also favors those competitor distributors with a pre-existing customer base that already purchase a greater share of RJR products.

Plaintiffs further allege that there are serious flaws in the methodology used by RJR to compute its share targets. Plaintiffs complain that the data does not accurately capture

non-reporting members, cash and carry purchases, or sales volume in certain counties within a state.[15] The mean per capita income provided by RJR is allegedly of little probative value because it masks relevant information about variations in income between different areas of a given county and does not account for the presence of nationwide convenience store chains in those areas (selling a higher percentage of RJR's second-tier Doral brand and other expensive products) and smaller, independent and rural retailers (selling a higher percentage of discount cigarettes to primarily local consumers).

Finally, plaintiffs produced evidence in the form of letters and testimony that when they attempted to qualify for RJR's best price, they suffered a substantial decline in the financial welfare of their businesses.

In sum, according to plaintiffs, the record evidence indicates that: (1) distributors cannot measurably increase the demand for RJR products; (2) plaintiffs do everything they can to sell as many RJR products as possible; (3) RJR's own data shows that the WPP's best price is practically achievable by only 8% of all distributors; and (4) plaintiffs and their most favored competitors did not face the same bad business choice in attempting to qualify for the WPP's best price.

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[15] Specifically, plaintiffs assert as follows:

> Perhaps even more glaring a deficiency in RJR's experts' per capita income comparison is the binary classification of each county within a state as either "served" or "unserved." RJR's methodology fatally makes no provision for sales volume (in units or dollars) in any "served" county. A county in which a Plaintiff sells 10 cartons of cigarettes per month was given equal weight to one in which that same Plaintiff sold 10,000 cartons per month. This analysis made no effort to accurately reflect concentrations in Plaintiffs' business.

Plaintiffs argue that each of these genuine issues of material fact on the functional availability issue warrants reversal of the district court's order granting summary judgment to defendant.

B.

As previously noted, a secondary-line price discrimination claim brought under § 13(a) of the Robinson-Patman Act requires proof that the defendant discriminated in price between different purchasers of commodities of like grade and quality, in interstate sales, and the effect of that discrimination was to substantially lessen competition or tend to create a monopoly in any line of commerce. *Volvo Trucks,* 126 S.Ct. at 870, 126 S.Ct. 860. The parties do not dispute that the relevant sales were made in interstate commerce and that the commodities were of like grade and quality.

Accepting as true plaintiffs' allegations in the context of this summary judgment review, we nonetheless conclude that summary judgment is warranted because the undisputed material facts demonstrate that RJR's best discount under the WPP was functionally available to plaintiffs on an equal basis, thus affirmatively disproving the element of discrimination in price.

We initially note that the WPP does not bear any of the obvious hallmarks of a discriminatory pricing program. RJR developed a share-based program, not a quantity-based program of the sort condemned by the Supreme Court in *Morton Salt.* Plaintiffs do not claim that they are too small to take advantage of the discount[16] or allege that they, unlike

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[16] Although not alleged in their complaint, plaintiffs broadly argue that WPP favors the largest distributors-"[T]he fact that 85% of RJR's volume may have qualified for Level 2 'A' pricing did not translate into 85% of RJR's distributors qualifying for that price. The 21 largest distributors

other wholesalers, were ignorant of its terms or deprived of access to the WPP. Further, there is no evidence that RJR manipulated the WPP to favor certain wholesalers. To the contrary, the evidence shows that RJR has evenhandedly applied the WPP, treating all of its wholesalers equally and offering all of them the same qualification terms. Each wholesaler performed equivalent functions to obtain the discounts.

To determine the share-of-savings targets, RJR first calculated an overall state target by ranking all of its wholesalers in the state, starting with the wholesaler with the highest RJR savings share (which, as RJR points out, was not necessarily the wholesaler with the highest volume) and ending with the wholesaler with the lowest RJR savings share. RJR then selected as the state target the RJR savings percentage of the wholesaler whose volume, when added to the volume of the wholesalers with higher savings brands shares, accounted for approximately 85% of RJR's wholesale volume in the state. RJR then calculated a share-of-savings target for each wholesaler, using the previously calculated state targets and weighting them to reflect the percentage of the wholesaler's business in different states. Because participation in the program did not depend on the volume of a wholesaler's RJR sales, small wholesalers were treated the same as large wholesalers.

Reiterating plaintiffs' core argument that RJR's best share-of-savings targets were unattainable (1) because they serviced retailers who sold to poorer customers, (2) resulting in a uniquely high demand for fourth-tier cigarettes, plaintiffs

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(of around 700 direct accounts) control 50% of RJR's sales volume and are at the WPP's highest program levels." This vague assertion is insufficient to support a claim that the WPP favors larger distributors by virtue of their greater purchasing power.

have proffered neither statistical evidence nor expert testimony to support these allegations. No plaintiff presented evidence both (1) that it sold only in lower-income areas in the states within its service area and (2) that the demand for fourth-tier cigarettes was higher in its sales area than in other areas of the state.

RJR, on the other hand, presented comparisons of the average per capita income in the counties served by each plaintiff to the average per capita income in the remaining counties in the states in which the plaintiff sold. This evidence, in the form of U.S. Department of Commerce data on county income levels, showed that the average per capita income in the served counties exceeded that of the counties not served for most plaintiffs. Only three of the original plaintiffs (Smith, Rice, and Pelican) sold in counties that had statistically lower average income levels than the remaining counties in the states in which they sold. Two of the plaintiffs (Rice and Smith) sold in virtually the same areas as another allegedly favored wholesaler, Virginia Wholesale, that earned discounts at an upper level of the WPP. Another plaintiff, Pelican, admitted that higher-income areas existed within its own sales area. In sum, the data showed that plaintiffs sell in a range of counties, from some that have relatively low incomes to others that have relatively high incomes.

Plaintiffs' expert conducted no analysis of this issue and admitted that he did not plan to offer an opinion on whether plaintiffs sold in lower-income areas. He did not factor income levels into a computation of lost profits. Two plaintiffs (A.B. Coker and Yakima) conceded that their sales areas included entire states, not merely low-income pockets

in those states. Other plaintiffs[17] conceded that they served higher-income portions of their sales areas or that higher-income areas existed in their sales areas. Some plaintiffs conceded that they had no evidence that they served lower-income areas or that their perception that they served lower-income areas was simply conjecture.[18]

Further, because plaintiffs failed to substantiate, with comparative data, differences in fourth-tier demand between the areas of states where they sell and those states as a whole, plaintiffs have thus failed to show that actual demand for fourth-tier cigarettes was, in fact, higher in their sales areas. Again, plaintiffs' expert did not address this issue. Moreover, plaintiffs presented no evidence that RJR's share in areas where plaintiffs sold was any different than RJR's statewide shares in the states where the allegedly less-affluent areas were located. In sum, plaintiffs are unable to verify the grounds for their price discrimination claim – that they predominantly service retailers who sell to poorer customers, resulting in a uniquely high demand for fourth-tier cigarettes-in turn foreclosing proofs that the WPP actually disfavored plaintiffs on the basis of these characteristics.

In any event, there is no evidence that anything other than plaintiffs' marketing decisions impacted their ability to obtain the WPP's best prices. The undisputed evidence demonstrates that plaintiffs faced a choice that was "not an inequity imposed by the pricing structure but a fundamental economic conundrum faced by all sellers." *Krist Oil Co.*,

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[17] Plaintiffs A.B. Coker, Andalusia, Caldwell, Church Point, Huntsville, Independent, Bates, Shanks, Pelican, Taylor, Reidsville, and Yakima.

[18] Plaintiffs Affiliated, Dixie, George, Shanks, McCarty-Hull, Pelican, Rice, and Topicz.

354 F.Supp.2d at 857. Plaintiffs could alter their sales mix at any time so as to qualify for the varying discount levels.

Plaintiffs complain that only a small percentage of wholesalers actually reached Level 2H. However, this is a neutral fact, not a material issue, which simply reflects the outcome of different choices made by different wholesalers. The legality of RJR's incentive program does not turn on whether, in fact, each wholesaler actually achieved the highest level in the WPP program. The very nature of an incentive program necessarily leads to different outcomes based on performance. *See, e.g. Comcoa,* 931 F.2d at 664; *Sweeney,* 637 F.2d at 121-22. As long as defendant offered the same best price to plaintiffs as to their competitors, using a nondiscriminatory pricing formula, defendant did not violate the Robinson-Patman Act.

Finally, with regard to plaintiffs' allegations of inflated shares, plaintiffs' proofs are lacking in a demonstration or appropriate comparison regarding how any discrepancy between actual and reported market share affected plaintiffs more than other supposedly favored wholesalers. Moreover, importantly, plaintiffs have failed to demonstrate how this allegedly improper calculation detrimentally affected competition. In essence, plaintiffs suggest that RJR did not have to set its discount levels in the particular manner set in the WPP: "RJR could set share targets that are reasonably related to each distributor's past sales and market share. This design, contrary to RJR's WPP, would treat all distributors equally at the outset because targets would be set according to the cigarette demands of each distributor's actual market and available customer base." However, we will not entertain plaintiffs' invitation to re-engineer the uniformly applied WPP incentive program to make it more reasonable for some participants. *See Sweeney,* 637 F.2d at 121-22 (declining to impose a "station by station" formula "[g]iven

the evenhanded application of the formula" and the "substantial administrative burden" on the defendant); *Rod Baxter Imports, Inc.*, 489 F.Supp. at 249 ("The evidence presented by plaintiff tending to indicate that some dealers would have been better or worse off if a longer base period was used, does not in the court's view establish that the program was unfair or that it may have had the effect of substantially limiting competition."). As the magistrate judge noted in his Report and Recommendation in the instant case:

> [T]he Court disagrees with the plaintiffs that defendant's decision to set the target goals on a statewide basis was arbitrary and improper. To be sure, there are two "arbitrary" factors in defendant's calculation. Using a state to set its targets, as opposed to some other geographical or demographical area, was arbitrary, but no other geographical area would have been any less arbitrary. And using eight-five percent as the baseline target also could be said to be arbitrary, since defendant could have chosen ninety percent, or seventy-five percent, or any other percentage. But picking a number fifteen percent below defendant's market share in a given state was not unreasonable. Plaintiffs essentially argue that defendant should have set the targets on a per-distributor basis which, of course, would be tantamount to having no market-share-based incentive program at all. These targets treat all distributors equally; each has the same opportunity to achieve higher discount levels. From the fact that unpleasant, even draconian, business decisions might be required, it does not follow that the discount scheme is discriminatory.

> Admittedly, the "reasonableness of choice" issue is troublesome.... But if the reasonableness or unreasonableness of business decisions is a factor that must be considered with respect to functional availability of a market-share-based discount program, then such a discount program always will be as inherently suspect as a volume-based discount program. Any given distributor could claim that it could not meet a market-share goal because it would be required to alter its business in some fashion which the distributor subjectively determines to be unreasonable. No seller could ever know if its program was lawful under Robinson-Patman; the legality of any market-share-based discount program only could be ascertained with respect to each and every buyer after a jury decides whether the business decisions forced upon that buyer were reasonable or not. Although plaintiffs argue they are not challenging market-share-based discount programs *per se,* in reality they are, simply because any distributor could challenge the target goal as unreasonable *as to it;* and if that distributor prevails, the entire discount program would collapse as unworkable. The result would be "tailor-made" discounts which themselves presumptively violate the Robinson-Patman Act.
>
> * * *
>
> Defendant's program is designed to promote its financial welfare at the expense of that of the wholesalers. Perhaps it is unfair, but it is not illegal.

The Robinson-Patman Act proscribes price discrimination only to the extent that it threatens to injure competition, and, in the absence of such a showing, we will not intercede so as to micromanage the distribution system of

defendant. As the Supreme Court noted in *Volvo Trucks*, the Robinson-Patman Act does not bar a manufacturer from restructuring its distribution system to refine productivity:

> The dissent assails Volvo's decision to reduce the number of its dealers.... But Robinson-Patman does not bar a manufacturer from restructuring its distribution networks to improve the efficiency of its operations. If Volvo did not honor its obligations to Reeder as its franchisee, "any remedy ... lies in state laws addressing unfair competition and the rights of franchisees, not in the Robinson-Patman Act" Brief for United States as *Amicus Curiae* 28.

Volvo Trucks, 126 S.Ct. at 873 n.4, 126 S.Ct. 860.

C.

Under the circumstances, we affirm the district court's order granting summary judgment in favor of defendant. As the district court properly found, the WPP's market-share discount was offered to all wholesalers using a non-discriminatory formula. It was therefore functionally available to plaintiffs not only in theory, but in fact. The capacity of plaintiffs to qualify for the WPP's best discount was a matter of marketing strategy and brand prioritization, a choice inherent and unavoidable in multi-brand incentive programs. Because the WPP discount was functionally available to plaintiffs, a requisite element of a prima facie secondary-line price § 13(a) claim, price discrimination has not been established, and plaintiffs' claim therefore fails as a matter of law.

Application of the WPP program may ultimately cull the number of RJR's distributors. However, the functional availability doctrine does not require a supplier to ensure the success of its customers. Whether this potential loss of

participating wholesalers will ultimately benefit *defendant* remains to be seen.

Affirmed.

Appendix B

United States Court of Appeals Sixth Circuit.

SMITH WHOLESALE COMPANY, INC.,
Rice Wholesale Co., Inc., Andalusia Distributing Co., Inc.,
Dixie Tobacco & Candy Co., George Wholesale Co., Ltd.,
Independent Wholesale Inc., L.P. Shanks Co.,
McCarty-Hull Cigar Co., Inc., R.C. Taylor Distributing Co.,
Reidsville Grocery Co., Inc., A.B. Coker Co., Inc.,
Affiliated Foods, Inc., Acadia Wholesale & Tobacco Co.,
Caldwell Wholesale Co., Inc., Novelart Manufacturing Co.,
Yakima Distributing Co., Inc., Huntsville Wholesale
Grocery, Pelican State Cigar & Tobacco, Inc.,
Plaintiffs-Appellants,

State of Mississippi, and State of Tennessee,
Intervenor Plaintiffs,

M.K. Grocery Co., Inc., and Corso, Inc.,
Plaintiffs,

v.

PHILIP MORRIS USA, INC.,
Defendant-Appellee.

No. 05-6481

Filed: February 27, 2007

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TENNESSEE

GRIFFIN, Circuit Judge.

The plaintiffs-appellants, twenty-nine full-service wholesalers that are also direct distributors under distribution agreements with defendant-appellee Philip Morris USA, Inc.

("PM") for the sale of PM tobacco products, brought suit against PM alleging that PM has engaged in price discrimination in violation of Section 2(a) of the Clayton Act, as amended by the Robinson-Patman Price Discrimination Act ("the Act"), 15 U.S.C. § 13(a), and attempted monopolization contrary to the Sherman Act, 15 U.S.C. § 2. The district court granted summary judgment in favor of PM with regard to both antitrust claims. Plaintiffs now appeal the summary judgment. For the reasons set forth below, we affirm.

I.

Generally, cigarette brands are divided into four price categories or "tiers." First-tier, or premium, cigarettes are the most expensive and are sold by manufacturers to wholesalers such as plaintiffs at more than $27 per carton. First tier cigarettes are produced primarily by the two largest United States manufacturers, PM and R.J. Reynolds Company ("RJR"). First-tier cigarettes include PM's Marlboro (with a 38% industry market share and representing 77.5% of PM's 2002 volume), and RJR's Camel, Winston, and Salem brands. Approximately 90% of PM's volume consists of first-tier brands versus 73% for the total United States tobacco industry. Second and third-tier cigarettes, priced substantially lower than first-tier cigarettes, are produced primarily by smaller manufacturers, such as Lorillard and Brown & Williamson. Fourth-tier brands, also known as deep-discount brands, are produced by even smaller manufacturers, including Liggett and several other new entrants into the cigarette market. Fourth-tier brands sell at prices significantly lower than third-tier brands. All discounted brands, whether second, third or fourth-tier, are collectively referred to as "value-priced" or "savings" brands.

PM does not price any of its savings brands at the fourth-tier level.[1]

PM is the leading cigarette manufacturer in the United States by market share (approximately 48%). Its rivals, however, account for more than half of all cigarettes sold in the United States. PM sells its products to about 700 distributors nationwide. These same distributors also distribute cigarettes manufactured by PM's competitors. Because wholesale distributors sell a wide variety of products, PM and other manufacturers use price incentives to bid for distributors' attention. Distributors, in turn, receive competing incentives from manufacturers, some of which they accept and some of which they reject. PM, like other cigarette companies, tries to persuade as many distributors as possible to make PM brands their first choice. PM has offered distributor incentives based on market share since 1994. Unlike volume discounts, PM's discounts are based on a

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[1] For further discussion of the cigarette industry, *see Smith Wholesale Co., Inc., et al. v. R. J. Reynolds Tobacco Co.* (the "*Reynolds*" case), 2:03-cv-00030, Case No. 05-6053, — F.3d — (6th Cir. Feb. 27, 2007), a companion case on appeal to this court, in which many of the same plaintiffs involved herein brought a similar action for injunctive relief and monetary damages against another cigarette manufacturer, R.J. Reynolds Tobacco Company, alleging that its Wholesale Partners Program ("WPP"), a market-share discount program applied to its wholesaler customers, violated antitrust laws. In both cases, heard before the Honorable J. Ronnie Greer, United States District Court Judge for the Eastern District of Tennessee, the plaintiffs, full-service wholesalers, led by original plaintiff Smith Wholesale Company, appeal the district court's orders granting summary judgment in favor of the defendants. The plaintiffs in both this case and the Reynolds case have alleged secondary-line price discrimination in violation of Section 2(a) of the Clayton Act, as amended by the Robinson-Patman Act, 15 U.S.C. § 13(a). The instant case involves an additional claim of an attempt to monopolize in violation of the Sherman Act, 15 U.S.C. § 2.

distributor's sales of PM cigarettes as *a percentage* of that distributor's total cigarette sales. PM compares (1) the percentage of a distributor's total cigarette sales in a particular geographic area (otherwise known as a "Section") that are PM products (a distributor's "PM share") with (2) share targets based on PM's market share in the Section.[2]

PM's market share fell from 51.6% to 48% between June 2001 and November 2002, as a result of the Master Settlement Agreement of 1998 and the subsequent entry of fourth-tier cigarette manufacturers into the market. PM responded by realigning its discount program, known as the Wholesale Leaders Program ("WL" program) to make it more competitive. The result was the initiation, in 2003, of the Wholesale Leaders 2003 Program ("WL 2003"). The WL 2003 took effect during the third quarter of 2003. The program offered an initial qualification period, was open to all of PM's direct distributors, and its terms were uniformly applied to all PM distributors. PM established three performance levels, lowered the requirements for obtaining the middle and highest level discounts (Levels 2 and 3), and increased the discounts available to distributors at those levels. PM also established a lowest level of discount (Level 1), with no market share requirement for distributors that specialized in the sale of rival brands and reduced the discounts offered to distributors at that level. Distributors operating in different Sections received varying discounts based on their performance in different Sections.[3]

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[2] In addition to its twenty-two Sections, PM maintained sales data from each of more than 1,800 sales "territories," geographic units served by a single PM sales representative and consisting of approximately 140 stores.

[3] From 1999 through the second quarter of 2003, PM's WL program gave a 2.75% gross discount on PM products to all direct distributors. The WL

Thus, pursuant to the WL 2003, a distributor with a PM share below PM's Section share target qualified for Level 1; a distributor with a PM share within range of PM's Section share target earned a larger discount at Level 2; and, a distributor with a PM share above PM's Section target share earned the largest discount at Level 3.[4] Since the program began in 2003, distributors of all sizes have qualified at every level; as a market-share program, PM's formula does not inherently disfavor small buyers.

The WL's maximum per carton price differences between the worst and best price from the second quarter of 1999 to the present were as follows: second quarter 1999 - second quarter 2000 ($0.23); third quarter 2000 - first quarter 2002 ($0.30); second quarter 2002 - second quarter 2003 ($0.32); third quarter 2003 ($0.81); fourth quarter 2003 ($0.55); first quarter 2004 - fourth quarter 2005 ($024); and first quarter 2006 ($0.36).

On June 11, 2003, sixteen plaintiffs, all full-service distributors serving grocery stores and other retail outlets in a multi-state region,[5] filed suit against PM, alleging that the WL program constituted illegal price discrimination and an attempt to monopolize under federal antitrust laws, specifically the Robinson-Patman Act, 15 U.S.C. § 13(a), and

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program also paid quarterly rebates (back-end monies) conditioned on the distributors achieving market share-based quotas of PM brands. In the fourth quarter of 2003, PM eliminated the backend money component of its WL program. For the first quarter of 2004, PM again revised its WL program, providing for a 2% base discount plus $0.07 per carton in back-end monies for Level 1 distributors, and a 2% base discount plus $0.26 in back-end monies for Level 2 distributors.

[4] No distributor's PM share had to be higher than 49.9% to achieve Level 3.

[5] Tobacco products constitute 50% or more of plaintiffs' revenues.

the Sherman Act, 15 U.S.C. § 2. Plaintiffs maintain that PM's highest share quotas and its most favored prices are not realistically achievable by plaintiffs; no plaintiff has ever received the WL's best price on all of its PM purchases. In July 2003, the states of Tennessee and Mississippi filed intervenor complaints after obtaining leave of the district court.

Plaintiffs sought a preliminary injunction to enjoin PM from discriminating as to the plaintiffs under its WL 2003. On August 6, 2003, the district court granted injunctive relief, enjoining PM from providing lower price discounts and/or rebates to the plaintiffs than were provided to the plaintiffs' competitors as proposed in the WL 2003. PM appealed and a stay of the preliminary injunction was granted by this court on September 18, 2003. After oral argument, but before a decision was rendered, PM voluntarily dismissed its appeal. Subsequently, additional new plaintiffs were added in a Second Amended and Restated Complaint filed on November 14, 2003.

On November 1, 2004, PM filed a motion for summary judgment pursuant to Rule 56(c). On August 17, 2005, the district court issued a Memorandum Opinion and Order, in which it granted summary judgment in favor of PM and dismissed the complaint. With regard to plaintiffs' Robinson-Patman Act claim, the district court reiterated the rationale it used in granting summary judgment in the companion *Reynolds* case. The court concluded that "PM's discount was functionally available to the plaintiffs in both theory and in fact":

> The Court FINDS that the undisputed fact that an outside influence, not in the control of PM, *i.e.* plaintiffs' customer demands, frustrated their performance does not render the discounts under PM's WL program functionally unavailable.

> Therefore, because PM's discount is functionally available under the undisputed facts of this case, the defendant has demonstrated the lack of an essential element of the plaintiffs' case, *i.e.* price discrimination, and PM is entitled to summary judgment on plaintiffs' Robinson-Patman Act claims.
>
> In this case, the Court also FINDS that there is no causal link between PM's practices and the plaintiffs' alleged injuries. Plaintiffs contend that they did not make a voluntary choice to emphasize fourth-tier or other non-PM brands over PM's products, but that they have simply responded to the demands of their customers. Therefore, by their own admission, the plaintiffs' inability to participate in WL is attributable to an outside influence over which PM had no control. In effect, the plaintiffs seek to reap the rewards of the WL without furthering the purpose of that program, *i.e.*, increasing the demand for PM products.

With regard to plaintiffs' Sherman Act claim, the district court noted that "[a] claim of attempted monopolization requires: (1) a specific intent to monopolize; (2) anti-competitive conduct; and (3) a dangerous probability of success," as evidenced by proof of market power in the relevant market. *TarrantServ. Agency, Inc. v. Am. Standard, Inc.*, 12 F.3d 609, 615 (6th Cir. 1993). The district court concluded that because plaintiffs failed to establish genuine issues of material fact relating to these three requisite elements, PM was entitled to summary judgment. Plaintiffs now timely appeal.

II.

A.

Plaintiffs first argue that they have proven all of the necessary elements of a prima facie secondary-line Robinson-Patman Act price discrimination claim pursuant to 15 U.S.C. § 13(a): (1) PM's cigarette sales are in interstate commerce; (2) PM cigarettes sold to plaintiffs are of like grade and quality as those sold to their most favored competitors; (3) PM discriminated in price between these competing distributors of like commodities; and (4) the effect of such discrimination was to injure, destroy, or prevent competition to the advantage of the favored purchaser. *Volvo Trucks North America, Inc. v. Reeder-Simco GMC, Inc. ("Volvo Trucks")*, 564 U.S. 164; 126 S. Ct. 860, 870; 163 L. Ed. 2d 663 (2006). Alternatively, plaintiffs assert that genuine issues of material fact exist regarding the functional availability of PM's best discounts.

Plaintiffs' price discrimination claim centers on the allegations contained in 11144-45 of their Second Amended and Restated Complaint:

> 44.
>
> Through the Program, PM is favoring distributors who reduce their sales of competitors' products, including those who do not sell a significant amount of 4th tier brands. Distributors such as Plaintiffs who cannot qualify for the best available prices (*i.e.* previously full Level 3, now full Level 2) under the Program pay much higher prices for Marlboro, which is a "must-carry" brand for all retailers. As a result, Plaintiffs previously had to either increase the price they charged retailers for PM products or temporarily absorb the price difference, often selling such products below cost. Either way, the Plaintiffs have been

> significantly and irreparably injured. PM's objective appears to be to weaken, and ultimately put out of business, those distributors most responsive to the demand for competitor and 4th tier brands. Indeed, industry analyst Bonnie Herzog of Citigroup has expressly noted that a "primary objective" of the Program is "to restrict the sale of deep discount 4th Tier brands."

45.

> The majority of Plaintiffs only can be Level 1 distributors because their sales of PM's cigarettes are much lower than PM's Level 2 target percentages. Prior to the 1st Quarter of 2004, to even qualify for Level 2 status, Plaintiffs needed on average to have raised their sales of PM cigarettes as a percentage of their sales of all manufacturers' cigarettes from 28.7% to 42.9%; Full Level 3 status required an on average increase from 28.7% to 49.2%. Given Plaintiffs' existing customer bases, their "low-end" areas of sales, PM's market share and the increased demand for competitor and 4th tier products by consumers, full Level 3 pricing was, as a practical reality, unavailable to them.

Plaintiffs aver that as full-service distributors, they do not have control over their market or product mix; rather, plaintiffs must sell what their retailers order, which in turn is driven by consumer demand. Thus, because fourth-tier brands have grown in response to consumer demand in the markets serviced by plaintiffs, and PM's dominant brands, such as Marlboro, have not changed significantly in market share, the only way for plaintiffs to even theoretically reach the WL's highest target percentages is to stop selling, or dramatically reduce, their sales of competitor cigarette brands, including fourth-tier brands. Second Amended Complaint,

¶¶ 46-47. However, "[p]laintiffs' retail customers will not accept this drastic change to the Plaintiffs' mix of product offerings because many of these retailers' customers cannot afford premium cigarettes. These retailers will shift the bulk of their purchases to a more favored distributor." *Id.* at ¶ 47.

Plaintiffs argue that because of overwhelming demand among their customer base, they began carrying a variety of competitors' discount products prior to 1999. Plaintiffs must sell nonPM cigarettes to satisfy the demand for lower-priced brands from the lower socioeconomic consumers their retailer-customers serve. Plaintiffs complain that, while they are forced to carry these non-PM fourth-tier brands to maintain their retail customer base, certain of plaintiffs' competitors did not have to carry them before 2000, either because they already enjoyed a higher-end customer base that demanded little or no discount product or they were predominantly fill-in suppliers. Thus, the majority of plaintiffs allegedly received the lowest WL payments at the start of the complaint period in 1999 while, at the same time, their more favored competitors immediately enjoyed the best WL pricing. Consequently, plaintiffs argue, these more favored competitors never faced the same unreasonable business decision as plaintiffs of abandoning a large part of their customer base by discontinuing the competitor products their retail customers demanded.[6]

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[6] Plaintiffs assert that they do not necessarily profit by selling rival brands – multiple plaintiffs testified that they actually made less money on fourth-tier brands than PM brands because fourth-tier manufacturers do not pay rebates. Although the margin percentage on fourth-tier brands may sometimes be higher than on premium brands, the greater price of PM brands earns every distributor more per carton on Marlboro than on any discount brand.

Plaintiffs further claim that an examination of WL's highest share targets reveals that PM often sets them far above its alleged Section market share. According to plaintiffs, in the first quarter of 2003, more than half of PM's highest Level 3 Section targets where plaintiffs operate exceeded PM's alleged Section market share. Plaintiffs argue that PM's claim, that the WL's target was set at least four share points below PM's alleged Section market share, is deceptive because the referenced Section target actually measured the Level 2 target, the intermediate price level, which would not entitle a distributor to PM's best discounts and back-end monies.

Plaintiffs also allege that PM has used faulty data in determining its share targets, thus significantly overstating its market share during the complaint period. Consequently, plaintiffs claim that the district court erred in failing to find that WL's grossly inflated share targets, which made it mathematically impossible for the vast majority of distributors to achieve the WL's best price — were solely within PM's control.

In addition, plaintiffs contend that the disparity between the WL's highest share targets and PM's alleged market share is further exacerbated when regional market areas within each Section are examined and the demographics of the areas are scrutinized. According to plaintiffs, the WL's Sections are artificial constructs with no specific relationship to the cigarette market; premium and discount sales areas are allegedly lumped together into a single Section that can include up to six states and does not account accurately for differences in demographics and income.[7]

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[7] Plaintiffs maintain that "[i]t makes sense to significantly lower share targets in [certain] areas (Baltimore, Washington, D.C. and Chicago) heavily populated by minorities because only two percent of Marlboro

Finally, plaintiffs argue that the district court failed to draw an inference from PM's own data that the WL's best price is not practically achievable by all distributors. Plaintiffs contend that PM's data shows that in the first quarter of 1999, only 366 of 1,051 distributors (34.8%) received close to the best price; in 2002, fewer than 17% of distributors achieved the WL's best price on 100% of their PM volume; in the first half of 2003, fewer than 27% of distributors received full Level 3 monies; and, in 2003, over 50% of PM's distributors failed to fully qualify for the Level 2 pricing.

B.

In our published opinion issued in the companion case, *Smith Wholesale Company, Inc. v. R. J. Reynolds Tobacco Co.*, Case No. 05-6053,[8] we engaged in a detailed discussion of the doctrine of functional availability in the context of a secondary-line Robinson-Patman price discrimination claim. The same legal analysis is applicable to the claims against PM, and, indeed, plaintiffs' legal arguments mirror, in all relevant respects, those made by the *Reynolds* plaintiffs. Thus, for purposes of the present appeal and to avoid redundancy, we adopt and incorporate by reference the standard of review, legal analysis, and authorities discussed in *Reynolds*.

As we highlighted in *Reynolds*:

> [T]he functional availability doctrine has been applied historically in the context of quantity discounts, yet its

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smokers are black. This is in sharp contrast to the fact that 50% of competitor menthol Newport smokers are black. Several Plaintiffs operate in significant minority markets." Plaintiffs note than PM briefly established subsection share targets that reflected these market variations but eliminated them in 2002. (Plaintiffs' Brief, p. 33 n.16).

[8] *See* Text, n. 1, *supra*.

> underlying rationale — that a discount equally and realistically available to all purchasers of a like commodity does not constitute discrimination in price within the meaning of § 13(a) — is no less relevant in judging the legality of market-share discount formulas such as the WPP.
>
> The doctrine seemingly defies the logic that a rational purchaser of goods will always seek to obtain the best discount or concession that is available to it; if a higher discount is realistically and practically available, why would a reasonable purchaser *not* take advantage of the best possible price? However, the functional availability doctrine reflects the realities of the marketplace and recognizes that purchasers in competitive markets, particularly multi-brand distributors or wholesalers, must make difficult economic choices, prioritize brand sales and often decline conditional discounts for reasons unrelated to their actual ability to obtain them. Thus, ... courts have refused to find price discrimination under § 13(a) when the purchaser's decision or capacity to take advantage of the best discount made "available on a reasonably equivalent basis to all dealers who made the commitment to obtain them" was determined by elements within its control — *i.e.*, unrelated investments; poor credit ratings; management issues, inventory decisions, or marketing strategies; or a decision to promote the competitor's product — and not by disproportionately small purchasing power or the pricing structure itself.

Reynolds, ____ F.3d at ____(citations omitted) (Slip op. at 16).

"The doctrine also underscores the fact that the Robinson-Patman Act neither ensures success nor excuses purchasers

from making difficult decisions about which competing brands to carry, market, or promote...." *Id.* We further noted that, in its recent decision in *Volvo Trucks,* the Supreme Court emphasized that "Robinson-Patman does not ban all price differences charged to different purchasers of commodities of like grade and quality; rather, the Act proscribes price discrimination only to the extent that it threatens to injure competition." *Volvo Trucks,* 126 S. Ct. at 870 (internal quotation marks and citations omitted). The *Volvo Trucks* Court "would resist interpretation [of the Robinson-Patman Act] geared more to the protection of existing *competitors* than to the stimulation of *competition.*" *Id.* at 872.

C.

The parties do not dispute that the first two elements of a secondary-line price discrimination claim have been established — the relevant sales were made in interstate commerce and the commodities were of like grade and quality. *Volvo Trucks,* 126 S. Ct. at 870. It is the latter two elements — whether defendant discriminated in price between different purchasers of commodities of like grade and quality, and whether the effect of that discrimination was to substantially lessen competition or tend to create a monopoly in any line of commerce — that are at issue in the present appeal.

In the context of this summary judgment review, in which we view the documentary evidence in the light most favorable to the non-moving party, *Kessler v. Visteon Corp.,* 448 F.3d 326, 329 (6th Cir. 2006), we nonetheless conclude that summary judgment was properly granted in favor of PM by the district court. The undisputed material facts show that PM's best discount pursuant to the WL program is functionally available to plaintiffs pursuant to a market-share based pricing formula that is uniformly applied to all of PM's

approximately 700 direct distributors operating throughout the country.

The WL program, like the WPP program at issue in *Reynolds,* does not bear the obvious characteristics of a discriminatory pricing program. The relevant discounts are not based on minimum volume,[9] plaintiffs do not allege that they were foreclosed from participation in the WL program, and there is no evidence that PM manipulated the WL to favor certain wholesalers. PM accounts for geographic market share variations by dividing the country into twenty-two Sections and setting different market-share targets for each Section. The targets for Level 2 discounts, the middle level, are set at least four share points below PM's actual

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[9] Plaintiffs do not aver in their Second Amended and Restated Complaint that the WL program discriminates on the basis of volume of sales, but they now allege that the WL is structured to favor large volume distributors over smaller ones, noting that "50% of PM dollar sales volume is controlled by the 13 largest distributors who generally receive the maximum WL monies." (Plaintiffs' Brief, p. 34). However, the proofs submitted by defendant in support of its summary judgment motion refute this general contention that the WL program inherently favors large volume purchasers. Ranking all PM wholesalers by size, based on industry volume, and dividing them into three groups (large, middle, and small), the data indicates that the number and percentage of wholesalers with all of their PM volume at Levels 2 and 3 of the WL 2003 is consistent across the various size groupings. Among the 232 largest wholesalers, 113 (48.7%) had all of their PM volume at Levels 2 or 3; among the middle group of 231 wholesalers, 108 (46.7%) had all of their PM volume at Levels 2 or 3; and, among the 232 smallest wholesalers, 116 (50%) wholesalers qualified all of their PM volume for Levels 2 or 3. Similarly, more of PM's smallest distributors also had all of their PM volume at Level 3 than did the middle or largest distributors during a designated period in 2003. Six of the ten smallest distributors in the United states, including the two smallest, had all of their volume at Level 3, while only one of the ten largest distributors had all of its volume at Level 3.

market share in every Section, and the Level 3 (most favorable discount) targets are set in relation to the Level 2 targets, and a distributor need not have a PM share greater than 49.9% to achieve Level 3. Thus, in every Section, a distributor could qualify for Level 2 with a PM share below PM's market share. Correspondingly, in ten of the twenty-two Sections, the Level 3 target was also below PM's Section market share and, in the remaining twelve Sections, the Level 3 target was never more than six points above PM's Section market share. Every distributor's performance within the Section is judged by the same standards and each wholesaler performs equivalent functions to obtain the discounts. Distributors have reached Level 3 in all of the twenty-two Sections.

The evidence of record indicates that, pursuant to this pricing scheme, nearly half of all distributors had all of their volume at Levels 2 or 3; four out of every five distributors qualified at least one-third of their PM volume at Levels 2 or 3; roughly half of all distributors (almost 350) qualified some volume for Level 3; more than one-third (over 200) qualified at least half of their PM volume at Level 3; and more than a quarter (almost 200) qualified all of their volume at Level 3.

Plaintiffs' allegation that "[n]o Plaintiff achieved the best price under PM's 2003 Program (*i.e.*, full Level 3 pricing for all its PM volume)"[10] and their contention that the vast majority of distributors could not qualify for the best price — an argument based on the percentage of distributors that *actually received PM's best price on 100% of their PM volume* — transform the relevant legal question, whether PM's best price is "available," into the irrelevant question

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[10] *See* plaintiffs' Second Amended and Restated Complaint, ¶ 38.

whether most distributors actually accepted PM's best offer. As we noted in *Reynolds:*

> Plaintiffs complain that only a small percentage of wholesalers actually reached [the highest discount level]. However, this is a neutral fact, not a material issue, which simply reflects the outcome of different choices made by different wholesalers. The legality of RJR's incentive program does not turn on whether, in fact, each wholesaler actually achieved the highest level in the WPP program. The very nature of an incentive program necessarily leads to different outcomes based on performance. As long as defendant offered the same best price to plaintiffs as to their competitors, using a nondiscriminatory pricing formula, defendant did not violate the Robinson-Patman Act.

Reynolds, __ F.3d at __ (citations omitted) (Slip op. at 22).

Distributors qualify different percentages of their volume at different levels as they respond to competition, and, in fact, it is an anticipated norm in the cigarette market that multi-brand, fullservice distributors will not always accept or seek to attain a particular manufacturer's best prices in all of their sales areas. Here, the undisputed evidence confirms that the WL's most favorable discount is functionally available to all of PM's direct distributors, not because a certain percentage of these distributors actually sought and obtained PM's best discount, but because the discount is offered on reasonably equivalent terms to all distributors, without regard to quantity purchasing power.[11]

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[11] PM has presented evidence that numerous distributors, including some plaintiffs (such as Taylor, Huntsville, Eby-Brown, and Smith), actually

Plaintiffs nonetheless maintain that full Level 3 pricing is, as a practical reality, unavailable to them "given [their] existing customer bases, their 'low-end' areas of sales, PM's market share and the increased demand for competitor and 4th tier products by consumers[.]" (Second Amended Complaint, ¶ 45). Plaintiffs complain that "[t]he fact that many Plaintiffs operate in heavily populated minority markets that do not purchase sufficient PM products to meet Level 3's grossly inflated share targets confirms multiple impediments to achieving WL's best price" and that "the overwhelming majority of PM market shares in zip codes served by Plaintiffs fall well below WL's Level 3 targets, and some even fall below the Level 2 targets." (Plaintiffs' Reply Brief, p. 9.) Plaintiffs suggest that more detailed data pertaining to the peculiar demographics of certain sales areas should be integrated into the WL, and subsections within each Section established to better reflect the realities of the market in those areas.

It is undisputed, however, that PM's market share in plaintiffs' sales area, defined by zip code, is equivalent to PM's market share in the Sections that include those sales areas. It is noteworthy that almost every plaintiff sells non-PM products at a much higher percentage than the market shares of those products in plaintiffs' sales areas, indicating that a particular sales mix is not necessarily inhibited by a manufacturer's overall market share in the sales area. Even assuming that PM did, in fact, as plaintiffs allege, inflate its market shares in the various Sections, plaintiffs have not demonstrated how the purported discrepancy between actual and reported market shares affected plaintiffs more than other

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increased their PM shares and altered their sales mix sufficiently to move from the lowest to higher levels during WL 2003.

supposedly favored wholesalers, or how this allegedly improper calculation detrimentally impacted competition. *Reynolds*, __ F.3d at __ (Slip op. at 22).

Plaintiffs, in essence, advocate tailor-made discounts, a concept that would undo the very basis of a market-share based incentive program and run afoul of the Robinson-Patman Act. As we emphasized in *Reynolds*, "we will not entertain plaintiffs' invitation to re-engineer the uniformly applied [WL] incentive program to make it more reasonable for some participants." *Reynolds*, __ F.3d at __ (Slip op. at 22). The WL formula may be imperfect, but it is not, under these particular circumstances, illegal, given its evenhanded application and the fact that its best discount is functionally available to all participants.

In sum, as we observed in *Reynolds*, "[t]he undisputed evidence demonstrates that plaintiffs faced a choice that was 'not an inequity imposed by the pricing structure but a fundamental economic conundrum faced by all sellers.' *Reynolds*, F.3d at (Slip op. at 22) (quoting *Krist Oil Co., Inc. v. Bernick's Pepsi-Cola ofDuluth, Inc.*, 354 F. Supp. 2d 852, 857 (W.D. Wis. 2005)). All multibrand, full-line distributors make different choices, on an ongoing basis, as to where to operate, what products to sell, which retail customers to serve, what prices to charge, and how to sell those products. In making their pricing decisions, wholesalers take into account the demand of their customers and their entire product mix. These choices lead each one to sell PM products in varying percentages of their overall cigarette sales.

Here, in the absence of evidence of discriminatory application of the market-share incentives, and in light of deposition testimony of plaintiffs' representatives consistently indicating that brand prioritization and marketing strategy governed their level of participation in the

WL, we can only conclude that it is these choices, not PM's formula, that determine whether plaintiffs will earn PM's higher discounts. Plaintiffs chose to focus on selling rival products, particularly fourth-tier products that typically offer higher profit margins for plaintiffs than PM's products. Wholesalers that choose to direct their efforts away from PM brands should not, however, reasonably expect to receive the same incentive payments awarded to those wholesalers that provide greater support for PM brands. To mandate equal incentive payments would not only create inefficient distribution cost imbalances in the cigarette market by requiring manufacturers such as PM to pay a disproportionate share of its lowest-performing wholesalers' distribution costs, but would also undermine the competitive purpose behind the market-share incentive program.

Under the circumstances, we therefore affirm the district court's order granting summary judgment in favor of defendant PM with regard to plaintiffs' Robinson-Patman price discrimination claim. PM does not provide discounts based on minimum volume, thereby favoring those distributors with the most volume purchasing power; the allegedly favored distributors are not large independent department stores or chain operations, and the price discounts foster – not impede – competition among suppliers of different brands. *Volvo Trucks*, 126 S. Ct. at 873. The WL program awards discounts to those distributors who, within the parameters of their existing capacity, help PM compete more effectively by aligning their own competitive business objectives with those of PM. Manufacturers need not "guarantee that all customers benefit to the same degree," *Comcoa, Inc. v. NEC Tel., Inc.*, 931 F.2d 655, 664 (10th Cir. 1991), but must make their discounts available through an evenly administered program. Because the WL's market-share discount was offered to all of PM's direct distributors, including plaintiffs, using a non-discriminatory formula that

was functionally available to plaintiffs, an essential element of a secondary-line price discrimination claim – discrimination in price between distributors of like commodities – has not been established, and plaintiffs' claim fails as a matter of law.

III.

In addition to their claim of price discrimination under the Robinson-Patman Act, plaintiffs allege that PM has engaged in an attempt to monopolize contrary to the Sherman Act, 15 U.S.C. § 2. As explained by this court in *Spirit Airlines, Inc. v. Northwest Airlines, Inc.*, 431 F.3d 917 (6th Cir. 2005):

> Section 2 of the Sherman Act, in pertinent part, makes it unlawful to "monopolize, or attempt to monopolize, ... any part of the trade or commerce among the several States...." 15 U.S.C. § 2. "[Section] 2 addresses the actions of single firms that monopolize or attempt to monopolize.... The purpose of the Act is not to protect businesses from the working of the market; it is to protect the public from the failure of the market." *Spectrum Sports Inc. v. McQuillan*, 506 U.S. 447, 454, 458 (1993). Under this statute, the defendant must "use ... monopoly power 'to foreclose competition, to gain a competitive advantage, or to destroy a competitor.' *Eastman Kodak [Co. v. Image Tech. Servs., Inc.]*, 504 U.S. [451] at 482-83 [(1992)] (quoting *United States v. Griffith*, 334 U.S. 100, 107 (1948)).

Spirit Airlines, Inc., 431 F.3d at 931-32.

"A claim for attempted monopolization under section two of the Sherman Act requires: (1) a specific intent to monopolize; (2) anti-competitive conduct; and (3) a dangerous probability of success." *Tarrant Serv. Agency,*

Inc., 12 F.3d at 615. Market strength that approaches monopoly power (the ability to control prices and exclude competition) is a necessary element for showing a dangerous probability of achieving monopoly power in an attempt to monopolize case. *Id.* The analysis in this regard requires that the court focus on the ability of a single seller to unilaterally raise prices and restrict output. *Spectrum Sports Inc.*, 506 U.S. at 457.

Here, plaintiffs claim that PM's dollar share of the cigarette market (56%) makes it the dominant company in the domestic cigarette market. PM's market share based on units sold is, according to plaintiffs, 49.6%. Plaintiffs also noted that PM's market share probably understates its market power, in light of the fact that PM and R.J. Reynolds have a combined market share of approximately 83%. However, "market share is only a starting point for determining whether monopoly power exists, and the inference of monopoly power does not automatically follow from the possession of a commanding market share[,]" *Amer. Council of Cert. Podiatric Physicians and Surgeons v. Amer. Bd. of Podiatric Surgery, Inc.*, 185 F.3d at 606, 623 (6th Cir. 1999), and considering a combination of market shares of more than one company is an inappropriate measure of PM's market power. *Arthur S. Langenderfer, Inc. v. S.E. Johnson Co.*, 917 F.2d 1413, 1433 (6th Cir. 1990). Market power under § 2 of the Sherman Act is "the ability of a single seller to raise prices and restrict output." *Virgin Atl. Airways, Ltd. v. British Airways*, 257 F.3d 256, 265 (2d Cir. 2001) (citation omitted).

Under the circumstances, the district court aptly concluded that there is no evidence, either direct or indirect, that PM possesses monopoly power. The fact that PM prices its cigarettes at almost five times the level of fourth-tier brands is not indicative of PM's ability to unilaterally control the price. To the contrary, both before and since implementation

of the WL, when PM lost market share, it responded by lowering prices. Marlboro's average retail price remains lower than prices of other key premium brands and became even lower after the introduction of the WL 2003 program.

Moreover, there is no evidence that PM has the power or ability to control other firms' production capacity. The undisputed evidence of record indicates that, after the industry's Master Settlement Agreement in 1998, the competition from fourth-tier cigarette manufacturers has expanded rapidly and made the relevant market even more competitive than ever. Indeed, this increased competition is the motivating factor behind PM's new discount incentives.

A firm also lacks market power when its competitors have excess production capacity and can produce more than the market demands at a competitive price. *Rebel Oil Co., Inc. v. Atlantic Richfield Co.*, 51 F.3d 1421, 1441 (9th Cir. 1995). It is undisputed that substantial excess production capacity exists in the U.S. cigarette market. R. J. Reynolds and Lorillard, with a combined market share of less than 30%, together have the capacity to produce nearly 50% of the 400 billion cigarettes consumed in the United States. PM cannot price above competitive levels because rivals will simply enter and increase input. As the district court opined in its well-reasoned opinion in this regard:

> [P]laintiffs have been unable to establish that WL decreases rather than increases competition. At best, plaintiffs' proof establishes only harm to individual competitors, not harm to competition. Plaintiffs have failed to present evidence that creates a genuine issue of material fact to support their allegation that WL has foreclosed any cigarette manufacturers from access to the relevant market.
>
> The relative lack of difficulty of entry into the U.S. cigarette industry likewise negates plaintiffs' claim of

anti-competitive conduct. Were PM to charge a price above the competitive price for its products, this record establishes that either existing competitors (RJR and Lorillard) or new competitors would enter the market (or increase production) and undercut PM's price. As indicated above, RJR and Lorillard together possess about fifty percent (50%) of the excess capacity for production of cigarettes and dozens of new manufacturers have entered the market since 1998. PM's WL program is a valid business reaction to market pressure brought about by increased competition for a declining cigarette market. Moreover, these plaintiffs admit that, were they to choose to discontinue sales of fourth tier brands altogether in order to achieve PM's best discounts, those brands would immediately be picked up by a competing distributor.

Thus, not only have plaintiffs not established a genuine issue of material fact on the issue of whether PM possesses sufficient market power to establish a dangerous probability of monopolization, no genuine issue of material fact exists on the issues of whether or not PM has engaged in anti-competitive conduct with the specific intent to monopolize. PM is likewise entitled to summary judgment on these grounds.

We agree with the district court's assessment that plaintiffs' Sherman Act attempted monopolization claim fails as a matter of law and therefore affirm the summary judgment in favor of PM on this issue.

IV.

For the reasons stated, the judgment of the district court is affirmed.

Appendix C

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TENNESSEE

SMITH WHOLESALE CO., INC., ET AL.
v.
PHILLIP MORRIS USA, INC.
NO. 2:03-CV-221

August 16, 2005, Decided
August 17, 2005, Filed

JUDGES: J. RONNIE GREER, United States District Judge.

MEMORANDUM OPINION

This *Robinson-Patman Act/Sherman Act* complaint is before the Court to consider the Motion for Summary Judgment filed by the defendant, Philip Morris USA Inc. ("PM"), on the basis that the defendant's discounts are functionally available to all distributors and because the defendant's market share incentive program is lawful under the *Sherman Act*..

On June 11, 2003, sixteen plaintiffs filed suit against PM alleging that PM's Wholesale Leaders ("WL") program, a market share based discount program, constituted illegal price discrimination and an attempt to monopolize under federal antitrust laws. 15 U.S.C. § 1 *et seq.* On July 14, 2003, the State of Mississippi filed an Intervenor's Complaint after obtaining leave of this Court. Seventeen new plaintiffs were added in an amended complaint filed with this Court on November 14, 2003.

On August 6, 2003, this Court granted a preliminary injunction which enjoined PM from providing lower price discounts and/or rebates to the plaintiffs than are provided to

the plaintiffs' competitors as proposed in the new 2003 WL. PM appealed this Court's order granting the preliminary injunction to the Court of Appeals for the Sixth Circuit and a Stay of the Preliminary Injunction was granted on September 18, 2003. PM's appeal of this injunction was argued and is currently pending before the Sixth Circuit.[1] Discovery is now closed. PM has filed its motion for summary judgment on all of the plaintiffs' claims and the claims of the State of Mississippi. After careful consideration of the record as a whole, this Court makes the following findings of fact and conclusions of law. For the purpose of deciding this motion for summary judgment, the Court will adopt the facts as submitted by the plaintiffs.

FACTUAL BACKGROUND SUBMITTED BY THE PLAINTIFF

A. Cigarette Industry

The U.S. cigarette industry is highly concentrated and oligopolistic. Philip Morris is the unchallenged market leader with 56% of sales by dollar volume and the two largest manufacturers, PM and R.J. Reynolds (RJR), now control more than 80% of the market. Like most oligopolies, the cigarette industry exhibits little price competition and shows lock-step pricing among manufacturers of premium cigarettes. Producers of low price 4th tier cigarettes have entered the market since the Master Settlement Agreement of 1998 and their entry has captured less than 15% of the market but has not caused a decrease in premium cigarette prices.

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[1] Given this Court's conclusion that PM's WL program violates neither the *Robinson-Patman Act* nor the *Sherman Act*, the preliminary injunction was improvidently granted.

B. Plaintiffs' Business

Plaintiffs sell tobacco and other products at wholesale to grocery and convenience stores and other retail outlets in various states. Tobacco products constitute 50% or more of their sales and most plaintiffs have purchased, directly from PM for more than 50 years. As full service wholesalers, plaintiffs supply their retailer customers with products they request, including all major manufacturers' cigarettes as well as 4th tier and other non-PM cigarettes. The retailers base their purchases on customer demand which is influenced by advertising, product promotions and retail store programs, all controlled by the manufacturer.

C. PM's Wholesale Leaders Programs – 1999 To Present

From 1999 through 2nd Quarter 2003, PM's Wholesale Leaders ("WL") program gave a 2.75% gross discount on PM products to direct distributors. It also paid back-end money (*i.e.*, quarterly rebates) conditioned on the wholesaler's achieving market share-based sales quotas of PM brands. Thus, a distributor's sales of PM brands compared with non-PM brands determined its rebate, and the best back-end monies were paid for achieving PM share percentages which could go as high as 58.9%. In other words, PM's WL program rewards distributors based on their sales of PM cigarettes as a percentage of their total cigarette sales.

Effective 3rd Quarter 2003, PM unilaterally revised its wholesale pricing structure by establishing a three-level pricing system, ranging from Level 1 (the least favored) to Level 3 (the most favored), that based both price discounts and back-end monies on a market share comparison. A share-based component also remains part of WL 2004. WL's per carton price differences between the worst and best price from 2nd Quarter 1999 to present were as follows:

Effective Date	Maximum Price Difference
2nd Quarter 1999 -- 2nd Quarter 2000	$ 0.23
3rd Quarter 2000 -- 1st Quarter 2002	$ 0.30
2nd Quarter 2002 -- 2nd Quarter 2003	$ 0.32
3rd Quarter 2003	$ 0.81
4th Quarter 2003	$ 0.55 (post injunction)
1st Quarter 2004 -- Present	$ 0.24

PM's highest share (Level 3) quotas and its most favored prices have never been achieved by the plaintiffs.

ROBINSON PATMAN/ACT CONCLUSIONS OF LAW

Plaintiffs' price discrimination claim is brought under Section 2(a) of the Robinson-Patman Act, 15 U.S.C. § 13(a). To establish a *prima facie* case under Section 2(a), plaintiffs must prove that: (1) PM's cigarette sales to plaintiffs and their competitors are "in interstate commerce"; (2) the sales involve PM cigarettes of "like grade and quality"; (3) the sales discriminate in prices[2] among these competing distributors; and (4) the discrimination substantially lessens competition and causes antitrust injury to plaintiffs. *Schwartz v. Sun Co., Inc.*, 276 F. 3d 900, 903-904 (6th Cir. 2002). Plaintiffs seek damages for claimed loss of profit, customers, sales, goodwill and business value that resulted from PM's allegedly discriminatory pricing. Plaintiffs further seek permanent injunctive relief against this alleged discrimination. The State of Mississippi is seeking injunctive relief on behalf of its consumers, wholesalers, and

[2] Simply put, this means a difference in price.

manufacturers and to prevent alleged injury to the economy of the state.

PM contends that summary judgment on plaintiffs' *Robinson-Patman Act* claims is appropriate in this case because PM's discounts are functionally available to the plaintiffs. If the best prices are "available equally and functionally to all customers", then no price discrimination has occurred. *Federal Trade Commission v. Morton Salt Co.*, 334 U.S. 37, 68 S. Ct. 822, 92 L. Ed. 1196, 44 F.T.C. 1499 (1948); *Bouldis v. U.S. Suzuki Motor Corp.*, 711 F.2d 1319 (6th Cir. 1983). The plaintiffs contend that summary judgment is inappropriate in this case because issues of material fact remain in regard to whether or not the defendant's discounts are functionally available for several reasons:

1. PM's data demonstrate that its best price is not available to all or most distributors,

2. PM's best price is unattainable because distributors do not control consumer demand,

3. Plaintiffs do everything asked of them to sell PM products,

4. PM's share quotas are inherently unachievable, and

5. Plaintiffs must sell 4th tier and other competitor cigarettes to retain their business.

Plaintiffs appear to concede that PM's discounts are theoretically available to them but argue that the "choices" they must make to take advantage of PM's best prices "could potentially destroy their businesses." They argue that Section 2(a) does not require them "to change their business structure, reconfigure their customer base, or adopt an

expensive and risky business plan in an effort" to achieve the best prices.[3]

The use of the functional availability theory to demonstrate the lack of an essential element of the plaintiffs' case, *i.e.* price discrimination, is technically not an affirmative defense, but the negation of an element of the plaintiff's case. *See Metro Ford Truck Sales, Inc. v. Ford Motor Co.*, 145 F.3d 320, n.17 (5th Cir. 1998). If an essential element of the plaintiff's case is negated, summary judgment is appropriate.

The theory of "functional availability" is explained by the Sixth Circuit in *Bouldis v. U.S. Suzuki Motor Corp.*, 711 F.2d 1319, 1326 (6th Cir. 1983):

> The practice of conditioning price concessions and allowances upon the customer's purchase of a specific quantity of goods will not give rise to a Robinson-Patman violation if the concessions are available equally and functionally to all customers. *See Federal Trade Comm. v. Morton Salt Co.*, 334 U.S. 37, 42, 68 S. Ct. 822, 826, 92 L. Ed. 1196, 44 F.T.C. 1499 (1948); *Shreve Equipment, Inc. v. Clay Equipment Corp.*, 650 F.2d 101, 105 (6th Cir.), *cert. denied*, 454 U.S. 897, 102 S. Ct. 397, 70 L. Ed. 2d 213 (1981); *Mowery v. Standard Oil Company of Ohio*, 463 F. Supp. 762, 775-76 n. 17 (N.D.Ohio 1976), *aff'd without opinion*, 590 F.2d 335 (6th Cir. 1978). *See generally* 16C Von Kalinowski, BUSINESS ORGANIZATIONS § 27.04 (1982).

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[3] The Court notes that such is the essence of a competitive economic system. Businesses that wish to succeed and gain market advantage over their competitors must make such choices everyday. Some flourish, some fail, but such is the nature of competition.

> Further, a claim of price discrimination will not lie if the buyer failed to take advantage of a price concession which was realistically and functionally available. *See Shreve Equipment, Inc., supra*, 650 F.2d at 105. The legislative history reveals that the aim of the Act is to prevent a large buyer from gaining discriminatory preferences over the small buyer solely because of the large buyer's greater purchasing power. *See Federal Trade Comm. v. Henry Broch & Co.*, 363 U.S. 166, 168-69, 80 S.Ct. 1158, 1160-61, 4 L. Ed. 2d 1124 (1960); *Morton Salt Co., supra*, 334 U.S. at 43, 68 S. Ct. at 826.

In *Bouldis,* the district court found that Suzuki's various promotional concessions and allowances were practically and realistically available to Bold-Morr, Inc., a former Suzuki motorcycle dealership whose officers and sole stockholders were Pete Bouldis and Norman Morris. In addition, the testimony of Bouldis revealed that he had cash flow and inventory problems at times which prevented him from participating in the promotional sales. Therefore, the Sixth Circuit found that, by his own admission, there was no causal link between Suzuki's practices and Bouldis' alleged injuries but rather his inability to participate was attributable to his own business problems. The Sixth Circuit concluded that conditioning price concessions and allowances on the purchase of a specific quantity of goods is allowed if concessions were made available equally and functionally to all customers. *Id.*

Several other circuits have addressed the "availability" theory as well. In *Edward J. Sweeney & Sons Co. v. Texaco, Inc.*, 637 F.2d 105 (3d Cir. 1980), the Third Circuit found that customer pickup allowances from the seller's uniform zone delivered pricing system based upon the distance from the seller's delivery point was nondiscriminatory because it

was available to all customers using a nondiscriminatory formula, even though different customers paid different prices. The Fifth Circuit found, in *Metro Ford Truck Sales*, 145 F.3d at 326, that price discrimination did not exist, and that no violation of the *Robinson-Patman Act* occurred, because Metro was treated the same as all other Ford dealers with respect to the CPA program for the same customer and products of like grade and quality. In *Comcoa, Inc. v. NEC Tel., Inc.*, 931 F.2d 655 (10th Cir. 1991), the Tenth Circuit found that there could be no recovery if the challenged discount was functionally available to the plaintiff and the program was evenly administered.

To the extent that there is an "availability" defense, it will fail if the lower price is not "practically" available to all competing customers. Discounts must be available not only in theory but in fact to be practically available. *See FLM Collision Parts, Inc. v. Ford Motor Co.*, 543 F.2d 1019, 1025-26 (2d Cir. 1976). ("equal opportunity" is required; "even when a seller has a dual pricing system, if the lower price is available to all purchasers, not only in theory but in fact, there is no violation of § 2(a)").

Discounts that have been held to not be functionally available because they were discounts in theory but not in fact are:

1. Quantity discounts. *See FTC v. Morton Salt Co.*, 334 U.S. 37, 92 L. Ed. 1196, 68 S. Ct. 822, 44 F.T.C. 1499 (1948) (holding that quantity discounts are not functionally available to many small buyers);

2. When the purchaser was not told about the discount. *See Caribe BMW, Inc. v. Bayerische Motoren Werke*, 19 F.3d 745 (1st Cir. 1994) (favorable prices not practically available if the buyer was not told that it would receive the same prices as customers purchasing from different facility of

supplier should buyer agree to purchase from that facility); and

3. When the purchaser was not permitted to participate in the program. *See DeLong Equip. Co. v. Washington Mills Abrasive Co.*, 887 F.2d 1499 (11th Cir. 1989) (recognizing the validity of the availability defense, but finding it inapplicable because the plaintiff was not given the opportunity to buy the lower-priced item).

None of these examples apply to the plaintiffs' situation because this case does not involve a quantity discount, the plaintiffs were told about the discount, and the plaintiffs were permitted to participate in the program. The Court FINDS that PM's discount is available to all customers using a nondiscriminatory formula, even though different customers may pay different prices, and that there is no evidence that the program was not evenly administered. Therefore, the Court FINDS that PM's discount was functionally available to the plaintiffs in both theory and in fact. That plaintiffs may be faced with difficult business choices, and even that some may go out of business, makes little difference and does not create a genuine issue of material fact in this case. The antitrust laws were never intended to protect individual competitors. *See Conwood Co., L.P. v. U.S. Tobacco Co.*, 290 F.3d 768, 769 (6th Cir. 2002), *cert. denied*, 537 U.S. 1148, 123 S. Ct. 876, 154 L. Ed. 2d 850 (2003). Each of the individual plaintiffs may choose to make these difficult decisions or to do nothing at all; nevertheless, the choice is theirs. PM does not dictate the choices these wholesalers make.

The plaintiffs cite *Caribe*, 19 F.3d at 752, for the proposition that "plaintiff need not give up the advantages of its importer's contract in order to obtain the most favorable price." However, *Caribe* really states:

The emphasized language says that Caribe did not know that its competitors were receiving favored treatment. And, we do not see how ordinarily one could say that a seller has made favored treatment "available" to a disfavored customer if the disfavored customer does not know about the favored treatment. *See, e.g., Alterman Foods, Inc. v. F.T.C.*, 497 F.2d 993, 1001 (5th Cir. 1974); *Mueller Co. v. F.T.C.*, 323 F.2d 44, 46-47 (7th Cir. 1963), *cert. denied, 377 U.S. 923, 84 S. Ct. 1219, 12 L. Ed. 2d 215 (1964)*; *Century Hardware Corp. v. Acme United Corp.*, 467 F. Supp. 350, 355-56 (E.D.Wis. 1979).

Caribe also argues that the favored treatment, as a practical matter, was not "available" because BMW AG insisted that it give up various advantages of its importer's contract in order to obtain it. We cannot tell from the complaint, however, just what those advantages were and how they related to the practical "availability" of the favorable treatment given other retailers. Thus, we cannot say, at this time, whether or not Caribe will be able to prove that the favorable price and terms, as a practical matter, were not available. At this stage, however, Caribe has sufficiently alleged that they were not.

Our conclusion is that Caribe's complaint states a valid *Robinson-Patman Act* claim, in respect to price discrimination under *Robinson-Patman Act* § 2(a), and for similar reasons, under the *Robinson-Patman Act* sections that deal with payments for services, furnishing services, and brokerage payments. 15 U.S.C. § 13 (b), (d)-(e). Although Caribe's pleadings regarding these other *Robinson-Patman Act* sections are rather sparse, they are sufficient to give BMW AG

> and BMW NA notice of the substance of Caribe's complaint. (*emphasis added*)

Id. at 752. Therefore, *Caribe* does not hold what the plaintiffs assert but merely addresses the sufficiency of the complaint.

The plaintiffs also cite *National Dairy Products Corp. v. F.T.C.*, 395 F.2d 517, 523 (7th Cir. 1968) for the proposition that "'the *Robinson-Patman Act* does not force [plaintiffs] to sacrifice their independence' in order to receive the highest discounts." *National Dairy* was a proceeding on a petition of a dairy product distributor to set aside an order and decision of the Federal Trade Commission. The Seventh Circuit held that where a dairy product distributor operated in 35 states and it was typical to have volume discount schedules in effect at various operations, the order of the Federal Trade Commission requiring it to cease from unlawful price practices was not an abuse of discretion in view of the showing that the practices had occurred in widespread areas over a long period of time. The Seventh Circuit concluded:

> We also cannot accept National's argument that the disfavored independents should have joined voluntary or cooperative groups and thus obtained higher discounts. *The Robinson-Patman Act* does not force them to sacrifice their independence. One of the reasons for its enactment was to protect the independents from the chains and other large buying groups. *Federal Trade Commission v. Anheuser-Busch, Inc.*, 363 U.S. 536, 543-544, 80 S. Ct. 1267, 4 L. Ed. 2d 1385; Rowe, Price Discrimination Under the Robinson-Patman Act (1962), pp. 11-23.

Id. at 523.

The Court FINDS that *National Dairy* is not on point with this case because that case involved volume discounts and

there has been no suggestion or requirement by PM that these plaintiffs join voluntary or cooperative groups and sacrifice their independence.

In addition, the plaintiffs cite *Calumet Breweries, Inc. v. G. Heileman Brewing Co., Inc.*, 951 F. Supp. 749 (N.D. Ind. 1994), in which a beer wholesaler brought an action challenging the legality of a brewer's quantity discount program. The Court in *Calumet* stated:

> Moreover, the evidence tends to discount Heileman's contention that it would be a reasonable business decision for Calumet, because of its physical storage capacities and economic resources, to purchase enough beer to obtain the maximum discount. Heileman argues that Calumet does not do so because it has decided to maximize sales of competing brands, such as Anheuser-Busch, rather than aggressively promoting sales of Heileman products. According to Heileman, Calumet should compete with Central by structuring its purchases: obtaining the maximum discount by buying more than a month's supply of beer, warehousing it, and then selling from inventory in the following month(s). Nothing in the *Robinson-Patman Act* or the cases interpreting it suggests that Calumet's decision to emphasize other brands and remain a (relatively) small seller of Heileman products ipso facto means Heileman may charge Calumet a higher price:
>
> The legislative history of the *Robinson-Patman Act* makes it abundantly clear that Congress considered it to be an evil that a large buyer could secure a competitive advantage over a small buyer solely because of the large buyer's quantity purchasing ability. *The Robinson-Patman Act* was passed to deprive a large buyer of such advantages except to the

> extent that a lower price could be justified by reason of a seller's diminished costs due to quantity manufacture, delivery or sale, or by reason of a seller's good faith effort to meet a competitor's equally low price. *Morton Salt*, 334 U.S. at 43, 68 S. Ct. at 826. (*emphasis added*)

Id. at 755.

Calumet is also not on point with this case because this case does not involve volume discounts which permit a large buyer to secure a competitive advantage over a small buyer because of the large buyer's quantity purchasing ability.

Therefore, the cases cited by the plaintiffs stand for the proposition that the plaintiffs do not have to alter their independent purchasing status to receive the discount. Not one of the cases cited by the plaintiffs addresses plaintiffs' selling status nor supports plaintiffs' assertion that *Section 2(a)* does not require plaintiffs to change their business structure, reconfigure their customer base, or undertake an expensive and risky business plan.

Although the plaintiffs contend that PM's discounts are not functionally available to them because of the demands of their customers, applicable case law does not support the plaintiffs' conclusion that the demands of a purchaser's customer can render a discount functionally unavailable. Courts have refused to find discrimination when the buyer's inability to take advantage of the best discount was within the control of the buyer, such as poor credit, management choices, decisions not to hold inventory, or particular marketing strategies. *See Bouldis*, 711 F.2d at 1327; *Shreve*, 650 F.2d at 105; *Edward J. Sweeney*, 637 F.2d at 121; *Chapman v. Rudd Paint & Varnish Co.*, 409 F.2d 635, 643 (9th Cir. 1969).

The Court FINDS that the undisputed fact that an outside influence, not in the control of PM, *i.e.* plaintiffs' customer demands, frustrated their performance does not render the discounts under PM's WL program functionally unavailable. Therefore, because PM's discount is functionally available under the undisputed facts of this case, the defendant has demonstrated the lack of an essential element of the plaintiffs' case, *i.e.* price discrimination, and PM is entitled to summary judgment on plaintiffs' *Robinson-Patman Act* claims.

In this case, the Court also FINDS that there is no causal link between PM's practices and the plaintiffs' alleged injuries. Plaintiffs contend that they did not make a voluntary choice to emphasize fourth-tier or other non-PM brand over PM's products, but that they have simply responded to the demands of their customers. Therefore, by their own admission, the plaintiffs' inability to participate in WL is attributable to an outside influence over which PM had no control. In effect, the plaintiffs seek to reap the rewards of the WL without furthering the purpose of that program, *i.e.*, increasing the demand for PM products.

The Court FINDS that, because the plaintiffs did not take advantage of a lower price or discount which was functionally available on an equal basis, no price discrimination has occurred. In the alternative, the Court FINDS that any alleged discrimination was not the proximate cause of the plaintiffs' complained of injuries.

SHERMAN ACT/CONCLUSIONS OF LAW

In addition to their claims under the *Robinson-Patman Act*, plaintiffs also allege that PM has engaged in an actionable attempt to monopolize in violation of the *Sherman Act*. A claim for attempted monopolization under § 2 of the Sherman Act, *15* U.S.C. § 2, requires: (1) a specific intent to monopolize; (2) anti-competitive conduct; and (3) a

dangerous probability of success. *Tarrant Service Agency, Inc. v. American Standard, Inc.*, 12 F.3d 609 (6th Cir. 1993). Because plaintiffs cannot show genuine issues of material fact as to these three necessary elements, summary judgment will also be granted to defendant on plaintiffs' *Sherman Act* claim.

DANGEROUS PROBABILITY OF SUCCESS

Market Power

The United States Supreme Court has held that market power is a necessary element for showing a dangerous probability of achieving monopoly power in an attempt to monopolize case. *Spectrum Sports v. McQuillan*, 506 U.S. 447, 457, 113 S. Ct. 884, 891, 122 L. Ed. 2d 247 (1993). In determining whether there is a dangerous probability of monopolization, courts have considered the relevant market and the defendant's ability to lessen or to destroy competition in that market. *Id.*

An attempt to monopolize claim requires "proof of market power", *id.* at 457, and market power is "the power to control prices or exclude competition." *United States v. Grinnell Corp.*, 384 U.S. 563, 571, 16 L. Ed. 2d 778, 86 S. Ct. 1698 (quoting *United States v. E. I. du Pont De Nemours & Co.*, 351 U.S. 377, 391, 100 L. Ed. 1264, 76 S. Ct. 994 (1956)). An analysis of market power requires that the court, focus on the ability of a single seller to unilaterally raise prices and restrict output. *Spectrum Sports* at 457; *Virgin Atlantic Airways, LTD. v. British Airways*, 257 F.3d 256 (2nd Cir. 2001); *Rebel Oil Co., Inc. v. Atlantic Richfield Co.*, 51 F.3d 1421 (9th Cir. 1995).

Plaintiffs assert that PM's "high market share is strong evidence of monopoly power" and argue that PM's dollar share of the cigarette market (56%) makes it the dominant company in the United States cigarette industry. This alone,

according to plaintiffs, is sufficient to defeat summary judgment. PM's market share based on units sold has been calculated by plaintiffs at 49.6%.

Plaintiffs' position, however, has been expressly rejected by the Sixth Circuit Court of Appeals. Market share, standing alone, is insufficient to establish market power as a matter of law and is only the starting point for determining whether monopoly power exists. "The inference of monopoly power does not automatically follow from the possession of a commanding market share." *American Counsel of Certified Podiatric Physicians and Surgeons v. American Board of Podiatric Surgery, Inc.*, 185 F.3d 606, 623 (6th Cir. 1999) (quoting *Byars v. Bluff City News Co.*, 609 F.2d 843, 850-851 (6th Cir. 1979)). *See also Richter Concrete Corp. v. Hilltop Concrete Corp.*, 691 F.2d 818 (6th Cir. 1982). PM's market share, standing alone, is therefore insufficient to establish market power as a matter of law.

Plaintiffs also suggest that PM's market share "likely understates its market power" since PM and RJR have a combined market share of about 83% and have very similar "exclusionary" programs. It is improper, however, to combine PM's market share with RJR's market share in determining whether or not PM has market power. *Arthur S. Langenderfer, Inc. v. S.E. Johnson Co.*, 917 F.2d 1413 (6th Cir. 1990). Plaintiffs have alleged no facts in this case which would suggest, and have not established, that PM and RJR have entered into any conspiracy such as would justify a combined share approach to determining market power. In short, plaintiffs have produced no evidence to show that PM's market share translates into market power.

Plaintiffs also assert that there is direct evidence that PM has monopoly power "as shown by its ability to exclude rivals and control price." In support of their assertion, plaintiffs point to certain affidavits and exhibits in which

plaintiffs contend that PM's WL program has undermined their competitiveness and increased their costs of distribution. Plaintiffs also assert that PM's ability to control prices is "demonstrated by the pricing of its premium cigarettes at almost five times the level of 4th tier products, its high product margins and inelastic demand for its products." This Court has already found that PM's conduct with respect to its WL program of market share discounts is not illegal or anti-competitive but is rather a valid business reaction to market pressures. Also, as pointed out by PM, the fact that PM prices its cigarettes at almost five times the level of 4th tier brands does not demonstrate PM's ability to unilaterally control the price. While this Court has considerable sympathy with the plaintiffs in this case and the effects the WL program may have on their businesses, it is well established that "competition is a ruthless process . . . and the anti-trust laws are not a balm for the rivals' wounds." *Tennessean Truck Stop, Inc. v. NTS, Inc.*, 875 F.2d 86, 90 (6th Cir. 1989) (quoting *Ball Memorial Hospital, Inc. v. Mutual Hosp. Ins., Inc.*, 784 F. 2d 1325, 1338 (7th Cir. 1986)). It is also well established that the anti-trust laws are designed to protect competition, not individual competitors. *Conwood*, 290 F. 3d at 788. Simply put, there is no evidence, direct or indirect, in this record that PM has monopoly power.

Low barriers to entry

The parties in this case apparently agree that entry into the U. S. cigarette market is relatively easy and that numerous new manufacturers and brands have entered the industry and successfully captured market share over the last

few years.[4] "The difficulty of entry into the market is relevant because if entry is easy, even a firm holding a commanding percentage of the market cannot charge a price above the competitive price, for once it does, competitors will enter the market and undercut the firm's price." *American Counsel of Certified Podiatric Physicians and Surgeons* at 623. Plaintiffs respond to PM's argument that such actual entry "is a strong indicator" that PM lacks market power by arguing that such entry "has not constrained premium cigarette pricing" and asserts that "the fringe 4th tier manufacturers have been limited by punitive state legislation and restricted access to efficient distribution channels as spearheaded by PM and RJR." This Court fails to see how such arguments by the plaintiffs can overcome the undisputed evidence of ease of entry by competitors into the U. S. cigarette market, and both parties agree that the relevant market at issue in this case is the United States cigarette market, not just the market for premium cigarettes.

Excess capacity

A firm also lacks market power when its competitors have excess capacity. Excess capacity is the ability of existing competitors to expand output to counteract a reduction in output by a provider with a large market share. Excess capacity inhibits monopoly pricing because consumers can obtain the product or service at competitive pricing from another provider Excess capacity deprives a relatively large "market share" of its normal "market power." *Rebel Oil Co.* at 1441. Two of PM's competitors, RJR and

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[4] Since the Master Settlement Agreement of 1998, dozens of new cigarette manufacturers have entered the market and have captured approximately 15% of the market despite an overall significant decline in U.S. cigarette sales over the last 20 years.

Lorillard, with a combined market share of less than 30%, together have the capacity to produce nearly 50% of the 400 billion cigarettes consumed in the United States in 2003. Plaintiffs respond to PM's argument by arguing that the excess capacity "resides primarily in PM and RJR" who have an "oligopoly strategy" of "supracompetitive" pricing. Plaintiffs ignore the fact that two of PM's competitors have nearly one-half of all excess capacity and that, as discussed by the Court above, market power is the ability of a single seller to raise prices and restrict output. Plaintiffs have presented no evidence that PM has the ability to control any other firm's production capacity or that PM can raise prices above competitive levels without rival manufacturers simply increasing output.

In summary, after examining barriers to entry, excess capacity, and PM's market share, plaintiffs have not established that there is a genuine issue of material fact as to whether or not PM has sufficient market power to establish a dangerous probability of success. *See Ford v. Stroup*, 113 F.3d 1234, 1997 WL 201560 (6th Cir. (Tenn.)). PM is, therefore, entitled to summary judgment for this reason alone.

ANTI-COMPETITIVE CONDUCT WITH THE SPECIFIC INTENT TO MONOPOLIZE

As the Sixth Circuit has observed:

> Anticompetitive conduct is conduct designed to destroy competition, not just to eliminate a competitor. Lively legal competition will result in the efficient and shrewd businessman routing the inefficient and imprudent from the field. The anti-trust laws must be administered in such a way that they do not restrain such vigorous competition in order to protect inefficient competitors. As Judge Learned Hand has pointed out, "The successful

> competitor, having been urged to compete, must not be turned on when he wins." *United States v. Aluminum Co. of America*, 148 F.2d 416, 430 (2nd Cir. 1945). Merely to attempt to succeed in business is not anti-competitive conduct.

Richter Concrete Corp. at 823.

Plaintiffs argue that PM's WL programs are exclusionary and anti- competitive and that specific intent to monopolize "can be inferred from the defendant's anti-competitive practices." Plaintiffs are correct that specific intent to monopolize may be inferred from evidence of anti-competitive conduct, *see Lorain Journal Co. v. United States*, 342 U.S. 143, 153, 96 L. Ed. 162, 72 S. Ct. 181 (1951), but not from legitimate business practices aimed only at succeeding in competition. *Times-Picayune Publishing Co. v. United States*, 345 U.S. 594, 626, 97 L. Ed. 1277, 73 S. Ct. 872 (1952). Antitrust law protects competition, not particular competitors. *Spectrum Sports* at 458-459. Whether conduct is anti-competitive for purposes of Section 2 of the Sherman Act, 15 U.S.C. § 2, depends on "whether 'valid business reasons' can explain [defendants'] actions." *Eastman Kodak Co. v. Image Technical Servs.*, 504 U.S. 451, 483, 119 L. Ed. 2d 265, 112 S. Ct. 2072 (1992).

The inference claimed by plaintiffs here, however, is unavailable to them because they have been unable to establish that PM's WL program has anti-competitive effect. In fact, plaintiffs have been unable to establish that WL decreases rather than increases competition. At best, plaintiffs' proof establishes only harm to individual competitors, not harm to competition. Plaintiffs have failed to present evidence that creates a genuine issue of material fact to support their allegation that WL has foreclosed any cigarette manufacturer from access to the relevant market.

The relative lack of difficulty of entry into the U.S. cigarette industry likewise negates plaintiffs' claim of anti-competitive conduct. Were PM to charge a price above the competitive price for its products, this record establishes that either existing competitors (RJR and Lorillard) or new competitors would enter the market (or increase production) and undercut PM's price. As indicated above, RJR and Lorillard together possess about fifty percent (50%) of the excess capacity for production of cigarettes and dozens of new manufacturers have entered the market since 1998. PM's WL program is a valid business reaction to market pressure brought about by increased competition for a declining cigarette market. Moreover, these plaintiffs admit that, were they to choose to discontinue sales of fourth tier brands altogether in order to achieve PM's best discounts, those brands would immediately be picked up by a competing distributor.

Thus, not only have plaintiffs not established a genuine issue of material fact on the issue of whether PM possesses sufficient market power to establish a dangerous probability of monopolization, no genuine issue of material fact exists on the issues of whether or not PM has engaged in anti-competitive conduct with the specific intent to monopolize. PM is likewise entitled to summary judgment on these grounds.

Antitrust Injury

As set forth throughout this memorandum opinion, plaintiffs also cannot establish an "injury of the type the antitrust laws were intended to prevent and that flows from that which makes the defendant's acts unlawful." *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489, 97 S. Ct. 690, 50 L. Ed. 2d 701(1977). Plaintiffs surely have suffered harm but such harm does not result from a decrease in competition rather than some other consequences of PM's

WL program. Their injuries, therefore, are not injuries which the antitrust laws were intended to prevent.

An appropriate order shall issue.

ENTER:

Date: 8/16/05

s/ J. RONNIE GREER

UNITED STATES DISTRICT JUDGE

ORDER

For the reasons set out in the Memorandum Opinion that accompanies this order, it is hereby **ORDERED** that that the Motion for Summary Judgment filed by the defendant, Philip Morris USA, Inc., is **GRANTED,** and the plaintiffs' complaint as well as the intervening complaint if the State of Mississippi is **DISMISSED.**

On August 6, 2003, this Court entered a preliminary injunction on behalf of the plaintiffs, the entry of which was appealed by Philip Morris USA and which is the subject of Court of Appeals Docket No. 03-6025 in the United States Court of Appeals for the Sixth Circuit. This Court's order provided that this injunction would remain in effect during the pendency of this lawsuit. In view of the dismissal of the plaintiffs' complaint by this order, it is also hereby **ORDERED** that the preliminary injunction entered by the Court on August 6, 2003 is **VACATED.** The defendant's motion for a hearing and request for oral argument is **DENIED.**

Appendix D

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TENNESSEE

SMITH WHOLESALE CO., INC., ET AL.
v.
R. J. REYNOLDS TOBACCO COMPANY
NO. 2:03-CV-30

June 3, 2005, Decided
June 3, 2005, Filed

JUDGES: J. RONNIE GREER, UNITED STATES DISTRICT JUDGE.

MEMORANDUM OPINION

This Robinson-Patman Act price discrimination complaint is before the Court to consider the Report and Recommendation ("R&R") of the United States Magistrate Judge which recommends that the Motion for Summary Judgment filed by the defendant, R. J. Reynolds Tobacco Company ("RJR"), be granted on the basis that the defendant's discounts are functionally available to all distributors. The plaintiffs have filed objections to this R&R.

28 U.S.C. § 636(b)(1) provides, in pertinent part:

> Within ten days after being served with a copy, any party may serve and file written objections to such proposed findings and recommendations as provided by rules of court. A judge of the court shall make a *de novo* determination of those portions of the report or specified proposed findings or recommendations to which objection is made. A judge of the court may accept, reject, or modify, in whole or in part, the

> findings or recommendations made by the magistrate. The judge may also receive further evidence or recommit the matter to the magistrate with instructions.

This court's de novo review of the magistrate judge's report is both statutorily and constitutionally required. *United States v. Worley*, 193 F.3d 380, 383-384 (6th Cir. 1999); *United States v. Shami*, 754 F.2d 670, 672 (6th Cir. 1985).

After careful consideration of the record as a whole, this Court makes the following findings of fact and conclusions of law. For the purpose of deciding this motion for summary judgment, the Court will adopt the plaintiffs' statement of facts filed on December 17, 2004, and other facts submitted in the plaintiffs' Memorandum.

PLAINTIFFS' STATEMENT OF UNDERLYING FACTS

RJR is engaged in the manufacture and sale of cigarettes in the United States and its territories. RJR is the second largest cigarette manufacturer in the United States and had a national market share of around 21 % prior to its July 30, 2004 merger with the United States operations of Brown & Williamson. The newly formed Reynolds American, Inc., now has a market share of around 31%. RJR's major premium brands include Camel and Winston. RJR's principal discount brand is Doral. RJR sells its tobacco products primarily to wholesalers (including distributors), large retail organizations, including chain stores, and the armed services. RJR competes with other cigarette manufacturers in the United States market for tobacco products, including Philip Morris USA, Inc. ("PM"), Lorillard, Liggett and all other cigarette manufacturers, often referred to by RJR as "AOMs."

Cigarette brands generally are divided into different price tiers. "Premium" or "superpremium" brands generally are the highest priced. RJR's Camel and Winston brands are premium brands. Other examples of premium cigarettes include PM's Mariboro and Lorillard's Newport. Second and third-tier cigarettes are, in most cases, considered discount brands and are collectively referred to as "value-priced" or "savings" brands. Fourth-tier, or "deep discount" cigarettes generally occupy the lowest price tier. Fourth-tier brands are primarily manufactured by cigarette manufacturers other than RJR.

Plaintiffs are wholesalers who sell a full line of products, including cigarettes, to grocery and convenience stores and other retail outlets in various states. Cigarette products constitute 50% or more of their sales revenues. Most plaintiffs have purchased directly from RJR and many have distributed RJR's products for more than 50 years. As full-line wholesalers, plaintiffs also supply their retailer-customers with all other major manufacturers' cigarettes as well as fourth-tier (deep discount) and other non-RJR cigarettes. RJR's 21 largest wholesalers, out of approximately 680 wholesalers, account for 50% of RJR dollar sales volume.

In August, 2000, RJR revised its wholesale pricing structure by implementing its Wholesale Partners Program ("WPP"). The WPP established a three-level pricing system (ranging from Level 1 (the least favored) to Level 3 (the most favored)) that based off-invoice price discounts and back-end monies (rebates paid to distributors at the close of each quarter) on a comparison of the distributor's sales of RJR's savings brands to its sales of non-RJR savings brands. To attain Level 2 and 3 pricing, a distributor's RJR savings brands sales must reach even higher percentage quotas. RJR modified the WPP at various times from August 2000 to

present. During the first through the fourth quarters 2003, only approximately 8% of RJR distributors qualified for the WPP's best discount and rebates (Level 2 "H" plus full Level 3).

From the second quarter 2002 through the third quarter 2003, Level 2 contained eight price categories: "A" through "H". Level 2 "A" was set at the minimum Level 2 RJR share of savings ("SOS") brands threshold to 1.5% above this minimum SOS threshold. Only when a distributor exceeded its Level 2 "A" SOS quota by 30.1% would it then qualify for Level 2 "H" back-end monies. In July 2003, RJR modified the WPP to further reduce the Level 2 and 3 back-end monies available to a Level 2 "A" distributor.

From August, 2003 through the first quarter 2004, all monies earned under RJR's WPP were based solely on a distributor's RJR share of total *savings* brands; beginning in the second quarter 2004, RJR adopted a "share of market" approach where WPP quotas were based on the distributor's RJR sales as a percentage of all cigarettes it sold. Other than that modification, the second quarter 2004 version of the WPP stayed basically the same as the prior quarter's version.

The WPP's maximum per carton price difference between Level 1 and the best price from August 2000 to the present was approximately:

Effective Date	Max Price Difference
August 2000 - April 2001	$ 0.55
May 2001 - May 2002	$ 0.50
June 2002 - December 2002	$ 0.57
January 2003 - June 2003	$ 0.85
July 2003 - September 2003	$ 1.12
October 2003 - March 2004	$ 0.75 (post injunction)
April 2004 - present	$ 0.74

Even distributors receiving intermediate pricing under the WPP suffer a substantial price disadvantage. For example, in July 2003, a Level 2 "A" distributor paid $ 0.40 per carton more than Level 2 "H" competitors who also received full Level 3 monies. Because RJR's highest share quotas and its more favored prices have not been achievable by plaintiffs, all have been classified as Level 1 distributors (some for the entire complaint period) under the WPP.

On January 31, 2003, Smith Wholesale filed suit against RJR alleging that (i) the WPP constituted illegal price discrimination under the Robinson-Patman Act (15 U.S.C. § 13(a)) and (ii) RJR wrongfully terminated its direct purchasing status in retaliation for raising antitrust complaints about the WPP to its retail customers. This Court enjoined RJR's termination of Smith Wholesale's direct purchasing status on February 7, 2003. On February 18, 2003, Rice Wholesale was added as a Plaintiff seeking identical relief. On March 4, 2003, this Court also enjoined RJR's termination of Rice Wholesale's direct purchasing status. RJR has appealed both termination injunctions to the United States Court of Appeals for the Sixth Circuit. RJR's appeals have been argued and are currently pending before the Sixth Circuit.

On June 11, 2003, nine current plaintiffs joined Smith Wholesale and Rice Wholesale in filing an amended complaint with this Court. Ten plaintiffs sought and obtained from this Court a preliminary injunction (granted on August 6, 2003) against the 1% discount reduction at Level 1 under the 2003 WPP. RJR appealed this Court's order granting the preliminary injunction to the Court of Appeals for the Sixth Circuit, and a Stay of the Preliminary Injunction was granted on September 24, 2003. RJR's appeal of this injunction was argued and is currently pending before the Sixth Circuit.

Since this Court's August 6, 2003 preliminary injunction, additional plaintiffs have joined this action and there are now a total of 20. Discovery is now closed. RJR filed its motion for summary judgment against all of the plaintiffs' claims and the claims of the States of Tennessee and Mississippi. RJR's motion has been fully briefed and is currently pending before this Court.

Plaintiffs' price discrimination claim is brought under Section 2(a) of the Robinson-Patman Act, 15 U.S.C. § 13(a). To establish a *prima facie* case, plaintiffs must prove that: (1) RJR's cigarette sales to plaintiffs and their competitors are "in interstate commerce"; (2) the sales involve RJR cigarettes of "like grade and quality"; (3) the sales discriminate in prices[1] among these competing distributors; and (4) the discrimination substantially lessens competition and causes antitrust injury to plaintiffs. *Schwartz v. Sun Co., Inc.*, 276 F. 3d 900, 903-904 (6th Cir. 2002). Plaintiffs seek damages for the loss of profit, customers, sales, goodwill and business value that resulted from RJR's discriminatory pricing. Plaintiffs further seek permanent injunctive relief against this discrimination. The States are seeking injunctive relief on behalf of their consumers, wholesalers, and manufacturers and to prevent alleged injury to the economies of their states.

Aside from the damages caused by the discriminatory pricing, the other central issue in dispute relates to the issue of what is commonly known as "functional availability." Plaintiffs contend that the issue is whether they and most or all of RJR's around 700 wholesale distributors could, as a practical matter, qualify for the best price under the WPP. Plaintiffs contend that the WPP's share targets for obtaining the best price are not realistically available for many reasons.

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[1] Simply put, this means a difference in price.

Plaintiffs' contentions in this regard include: (1) the demand for RJR's products is insufficient among plaintiffs' available retailer-customer base; (2) wholesalers do not control and hence cannot materially increase customer demand for RJR's products; (3) wholesalers cannot materially alter their RJR-share figures by discounting sales of RJR-competitor products without a substantial loss of sales and customers; (4) disfavored wholesalers paying the highest prices for RJR products cannot realistically compete for coveted high RJR share retail accounts; and (5) even when there is a demand for RJR products, RJR does not provide plaintiffs with all the RJR products to satisfy their customers' orders. Plaintiffs have not made any "choice" to emphasize fourth-tier or other non-RJR brand over RJR's products. They simply respond to the demand of their customers.

CONCLUSIONS OF LAW

As an initial matter, the plaintiffs contend that certain of the Court's findings in its preliminary injunction memorandum opinion should have been considered in deciding the defendant's motion for summary judgment. However, it is clearly settled that the purpose of a preliminary injunction is simply to preserve the status quo, and that findings of fact and conclusions of law made by a district court in granting a preliminary injunction are not binding at a trial on the merits. *University of Texas v. Camenisch*, 451 U.S. 390, 395, 101 S.Ct. 1830, 68 L.Ed.2d 175 (1981); *United States v. Edward Rose & Sons*, 384 F.3d 258, 261 (6th Cir. 2004). Therefore, this Court's findings of fact and conclusions of law made in conjunction with its order granting the plaintiffs a preliminary injunction are not binding on this Court in addressing the defendant's motion for summary judgment.

The defendant contends that summary judgment is appropriate in this case because RJR's discounts are

functionally available to the plaintiffs. The plaintiffs contend that summary judgment is inappropriate in this case because whether or not the defendant's discounts are functionally available is clearly a jury question. The use of the functional availability theory to demonstrate the lack of an essential element of the plaintiffs' case, *i.e.* price discrimination, is technically not an affirmative defense, but the negation of an element of the plaintiff's case. *See Metro Ford Truck Sales, Inc. v. Ford Motor Co.*, 145 F.3d 320, n. 17 (5th Cir. 1998). If an essential element of the plaintiff's case is negated, summary judgment is appropriate.

The theory of "functional availability" is explained by the Sixth Circuit in *Bouldis v. U.S. Suzuki Motor Corp.*, 711 F.2d 1319, 1326 (6th Cir. 1983):

> The practice of conditioning price concessions and allowances upon the customer's purchase of a specific quantity of goods will not give rise to a Robinson-Patman violation if the concessions are available equally and functionally to all customers. *See Federal Trade Comm. v. Morton Salt Co.*, 334 U.S. 37, 42, 68 S. Ct. 822, 826, 92 L. Ed. 1196, 44 F.T.C. 1499 (1948); *Shreve Equipment, Inc. v. Clay Equipment Corp.*, 650 F.2d 101, 105 (6th Cir.), *cert. denied*, 454 U.S. 897, 102 S. Ct. 397, 70 L. Ed. 2d 213 (1981); *Mowery v. Standard Oil Co.*, 463 F. Supp. 762, 775-76 n. 17 (N.D. Ohio 1976), *aff'd without opinion*, 590 F.2d 335 (6th Cir. 1978). *See generally* 16C Von Kalinowski, BUSINESS ORGANIZATIONS § 27.04 (1982). Further, a claim of price discrimination will not lie if the buyer failed to take advantage of a price concession which was realistically and functionally available. *See Shreve Equipment, Inc., supra*, 650 F.2d at 105. The legislative history reveals that the aim of the Act is to

> prevent a large buyer from gaining discriminatory preferences over the small buyer solely because of the large buyer's greater purchasing power. *See Federal Trade Comm. v. Henry Broch & Co.*, 363 U.S. 166, 168-69, 80 S.Ct. 1158, 1160-61, 4 L.Ed.2d 1124 (1960), *Morton Salt Co., supra*, 334 U.S. at 43, 68 S. Ct. at 826.

In *Bouldis,* the district court found that Suzuki's various promotional concessions and allowances were practically and realistically available to Bold-Morr, Inc., a former Suzuki motorcycle dealership whose officers and sole stockholders were Pete Bouldis and Norman Morris. In addition, the testimony of Bouldis revealed that he had cash flow and inventory problems at times which prevented him from participating in the promotional sales. Therefore, the Sixth Circuit found that, by his own admission, there was no causal link between Suzuki's practices and Bouldis' alleged injuries but rather his inability to participate was attributable to his own business problems. The Sixth Circuit concluded that conditioning price concessions and allowances on the purchase of a specific quantity of goods is allowed if concessions were made available equally and functionally to all customers. *Id.*

Several other circuits have addressed the "availability" theory as well. In *Edward J. Sweeney & Sons Co. v. Texaco, Inc.*, 637 F.2d 105 (3d Cir. 1980), the Third Circuit found that customer pickup allowances from the seller's uniform zone delivered pricing system based upon the distance from the seller's delivery point was nondiscriminatory because it was available to all customers using a nondiscriminatory formula, even though different customers paid different prices. The Fifth Circuit found, in *Metro Ford Truck Sales*, 145 F.3d at 326, that price discrimination did not exist, and that no violation of the Robinson-Patman Act occurred,

because Metro was treated the same as all other Ford dealers with respect to CPA program for the same customer, and products of like grade and quality. In *Comcoa, Inc. v. NEC Tel., Inc.*, 931 F.2d 655 (10th Cir. 1991), the Tenth Circuit found that there could be no recovery if the challenged discount was functionally available to the plaintiff and the program was evenly administered.

To the extent that there is an "availability" defense, it will fail if the lower price is not "practically" available to all competing customers. Discounts must be available not only in theory but in fact to be practically available. *See FLM Collision Parts, Inc. v. Ford Motor Co.*, 543 F.2d 1019, 1025-26 (2d Cir. 1976) ("equal opportunity" is required; "even when a seller has a dual pricing system, if the lower price is available to all purchasers, not only in theory but in fact, there is no violation of § 2(a)").

Discounts that have been held to not be functionally available because they were discounts in theory but not in fact are:

1. Quantity discounts. *See FTC v. Morton Salt Co.*, 334 U.S. 37, 92 L. Ed. 1196, 68 S. Ct. 822, 44 F.T.C. 1499 (1948) (holding that quantity discounts are not functionally available to many small buyers);

2. When the purchaser was not told about the discount. See *Caribe BMW v. Bayerische Motoren Werke Aktiengesellschaft*, 19 F.3d 745 (1st Cir. 1994) (favorable prices not practically available if the buyer was not told that it would receive the same prices as customers purchasing from different facility of supplier should buyer agree to purchase from that facility); and

3. When the purchaser was not permitted to participate in the program. *See DeLong Equip. Co. v.*

Washington Mills Abrasive Co., 887 F.2d 1499 (11th Cir. 1989) (recognizing the validity of availability defense, but finding it inapplicable because the plaintiff was not given the opportunity to buy the lower-priced item).

None of these examples apply to the plaintiffs' situation because this case does not involve a quantity discount, the plaintiffs were told about the discount, and the plaintiffs were permitted to participate in the program. The Court FINDS that RJR's discount is available to all customers using a nondiscriminatory formula, even though different customers may pay different prices, and that there is no evidence that the program was not evenly administered. Therefore, the Court FINDS that RJR's discount was functionally available to the plaintiffs in both theory and in fact.

The plaintiffs cite *Caribe*, 19 F.3d at 752 for the proposition that "plaintiff need not give up the advantages of its importer's contract in order to obtain the most favorable price." However, *Caribe* really states:

> The emphasized language says that Caribe did not know that its competitors were receiving favored treatment. And, we do not see how ordinarily one could say that a seller has made favored treatment "available" to a disfavored customer if the disfavored customer does not know about the favored treatment. *See, e.g.*, *Alterman Foods, Inc. v. F.T.C.*, 497 F.2d 993, 1001 (5th Cir. 1974); *Mueller Co. v. F.T.C.*, 323 F.2d 44, 46-47 (7th Cir. 1963), *cert. denied*, 377 U.S. 923, 84 S.Ct. 1219, 12 L.Ed.2d 215 (1964); *Century Hardware Corp. v. Acme United Corp.*, 467 F.Supp. 350, 355-56 (E.D. Wis. 1979).
>
> Caribe also argues that the favored treatment, as a practical matter, was not "available" because BMW AG insisted that it give up various advantages of its

> importer's contract in order to obtain it. We cannot tell from the complaint, however, just what those advantages were and how they related to the practical "availability" of the favorable treatment given other retailers. Thus, we cannot say, at this time, whether or not Caribe will be able to prove that the favorable price and terms, as a practical matter, were not available. At this stage, however, Caribe has sufficiently alleged that they were not.
>
> Our conclusion is that Caribe's complaint states a valid Robinson-Patman Act claim, in respect to price discrimination under Robinson-Patman Act § 2(a), and for similar reasons, under the Robinson-Patman Act sections that deal with payments for services, furnishing services, and brokerage payments. 15 U.S.C. § 13(b), (d)-(e). Although Caribe's pleadings regarding these other Robinson-Patman Act sections are rather sparse, they are sufficient to give BMW AG and BMW NA notice of the substance of Caribe's complaint. (*emphasis added*).

Id. at 752. Therefore, *Caribe* does not hold what the plaintiffs assert but merely addresses the sufficiency of the complaint.

The plaintiffs also cite *National Dairy Products Corp. v. F.T.C.*, 395 F.2d 517, 523 (7th Cir. 1968) for the proposition that "'the Robinson-Patman Act does not force [plaintiffs] to sacrifice their independence' in order to receive the highest discounts." *National Dairy* was a proceeding on a petition of a dairy product distributor to set aside an order and decision of the Federal Trade Commission. The Seventh Circuit held that where a dairy product distributor operated in 35 states and it was typical to have volume discount schedules in effect at various operations, the order of the Federal Trade Commission requiring it to cease from unlawful price

practices was not an abuse of discretion in view of the showing that the practices had occurred in widespread areas over a long period of time. The Seventh Circuit concluded:

> We also cannot accept National's argument that the disfavored independents should have joined voluntary or cooperative groups and thus obtained higher discounts. The Robinson-Patman Act does not force them to sacrifice their independence. One of the reasons for its enactment was to protect the independents from the chains and other large buying groups. *Federal Trade Commission v. Anheuser-Busch, Inc.*, 363 U.S. 536, 543-544, 80 S.Ct. 1267, 4 L.Ed.2d 1385; Rowe, Price Discrimination Under the Robinson-Patman Act (1962), pp. 11-23.

Id. at 523.

The Court FINDS that *National Dairy* is not on point with this case because that case involved volume discounts and there has been no suggestion that these plaintiffs join voluntary or cooperative groups and sacrifice their independence.

In addition, the plaintiffs cite *Calumet Breweries, Inc. v. G. Heileman Brewing Co., Inc.*, 951 F.Supp. 749 (N.D. Ind. 1994), in which a beer wholesaler brought an action challenging the legality of a brewer's quantity discount program. The Court in *Calumet* stated:

> Moreover, the evidence tends to discount Heileman's contention that it would be a reasonable business decision for Calumet, because of its physical storage capacities and economic resources, to purchase enough beer to obtain the maximum discount. Heileman argues that Calumet does not do so because it has decided to maximize sales of competing brands, such as Anheuser-Busch, rather than aggressively

promoting sales of Heileman products. According to Heileman, Calumet should compete with Central by structuring its purchases: obtaining the maximum discount by buying more than a month's supply of bee,. warehousing it, and then selling from inventory in the following month(s).

Nothing in the Robinson-Patman Act or the cases interpreting it suggests that Calumet's decision to emphasize other brands and remain a (relatively) small seller of Heileman products ipso facto means Heileman may charge Calumet a higher price:

> The legislative history of the Robinson-Patman Act makes it abundantly clear that Congress considered it to be an evil that a large buyer could secure a competitive advantage over a small buyer solely because of the large buyer's quantity purchasing ability. The Robinson-Patman Act was passed to deprive a large buyer of such advantages except to the extent that a lower price could be justified by reason of a seller's diminished costs due to quantity manufacture, delivery or sale, or by reason of a seller's good faith effort to meet a competitor's equally low price. *Morton Salt*, 334 U.S. at 43, 68 S. Ct. at 826. (*emphasis added*)

Id at 755.

Calumet is also not on point with this case because this case does not involve volume discounts which permit a large buyer to secure a competitive advantage over a small buyer because of the large buyer's quantity purchasing ability.

The plaintiffs cite *Boise Cascade Corp.*, 107 F.T.C. 76, 184(1986) *rev'd on other grounds*, *Boise Cascade Corp. V. FTC*, 267 U.S. App. D.C. 124, 837 F.2d 1127 (D.C. Cir. 1988), contending that the FTC rejected the "functional

availability defense because it was impractical for dealers to change their business in order to qualify for discriminatory discounts." In that case, Boise, a distributor of office products, was ordered to cease accepting from any supplier, in particular six manufacturers, a net price for office products that is lower than the price at which the supplier sells the products to other retailers with whom Boise competes. The Commission ruled that Boise violated the Robinson-Patman Act by knowingly receiving wholesaler discounts on goods it sold at retail in competition with other dealers.

According to Boise, any injury to the dealers could have been avoided since the lower prices which it enjoyed were also functionally available to them because:

> (1) If they performed wholesale functions, as does Boise, they are entitled to the wholesale discount;
>
> (2) Discounts equal to the wholesale discounts on large purchases, and discounts on private label goods, are available;
>
> (3) Buying groups and cooperatives can obtain wholesale discounts; and
>
> (4) Competitors of the six manufacturers offer dealers the same or greater discounts as Boise now obtains.

The FTC concluded that Boise's claims are both factually and legally incorrect.

In *Boise,* the FTC cites *Shreve Equipment, Inc. v. Clay Equipment Corp.*, 650 F.2d 101 (6th Cir.), *cert. denied* 454 U.S. 897 (1981), concluding that the court held that a discount was available, but only because the purchaser "did not have to alter its independent purchasing status to receive the discount, as was the case in *Dayco*." *Id.* at 107. The FTC concluded that the discount structures employed by the six manufacturers were designed to reward wholesalers for the

functions which they perform and to prevent dealers from obtaining the wholesale discount despite their performance of equivalent functions, and that this structure ensures that the wholesale discount is not available to dealers who compete with Boise.

Finally *Dayton Rubber Co.*, 66 F.T.C. 423, *rev'd on other grounds, Dayco Corp. v. FTC*, 362 F.2d 180 (6th Cir. 1966), is not on point with the facts of this case. In that case, FTC rejected the argument that no price discrimination had occurred where lower prices were available to all "sub-jobbers" if they formed jobber groups. The FTC held that lower prices are unavailable where a purchaser must alter his purchasing status before receiving them. In this case, the defendant has not suggested that the plaintiffs alter their independent purchasing status to receive the discount.

Therefore, four of the five cases cited by the plaintiffs stand for the proposition that the plaintiffs do not have to alter their independent purchasing status to receive the discount. Not one of the five cases cited by the plaintiffs addresses plaintiffs' selling status or plaintiffs' assertion that Section 2(a) does not require plaintiffs to change their business structure, reconfigure their customer base, or undertake an expensive and risky business plan.

Although the plaintiffs contend that RJR's discounts are not functionally available to them because of the demands of their customers, applicable case law does not support the plaintiffs' conclusion that the demands of a purchaser's customer can render a discount functionally unavailable. Courts have refused to find discrimination when the buyer's inability to take advantage of the best discount was within the control of the buyer, such as poor credit, management choices, decisions not to hold inventory, or particular marketing strategies. *See Bouldis*, 711 F.2d at 1327; *Shreve*, 650 F.2d at 105; *Edward J. Sweeney*, 637 F.2d at 121;

Chapman v. Rudd Paint & Varnish Co., 409 F.2d 635, 643 (9th Cir. 1969).

The Court FINDS that the undisputed fact that an outside influence, not in the control of RJR, *i.e.* plaintiffs' customer demands, frustrated their performance does not render the discount functionally unavailable. Therefore, because RJR's discount was functionally available, under the undisputed facts of this case, the defendant has demonstrated the lack of an essential element of the plaintiffs' case, *i.e.* price discrimination.

In this case, the Court also FINDS that there is no causal link between RJR's practices and the plaintiffs' alleged injuries. Plaintiffs contend that they did not make a voluntary choice to emphasize fourth-tier or other non-RJR brand over RJR'S products, but that they have simply responded to the demands of their customers. Therefore, by their own admission, the plaintiffs' inability to participate in WPP is attributable to an outside influence over which RJR had no control. In effect, the plaintiffs seek to reap the rewards of the WPP without furthering the purpose of that program, *i.e.*, increasing the demand for RJR products.

The Court FINDS that, because the plaintiffs did not take advantage of a lower price or discount which was functionally available on an equal basis, no price discrimination has occurred. In the alternative, the Court FINDS that any alleged discrimination was not the proximate cause of the plaintiffs' injuries.

An appropriate order shall issue.

ENTER:

Date: 6/3/05

s/J. RONNIE GREER

UNITED STATES DISTRICT JUDGE

ORDER

For the reasons set out in the Memorandum Opinion that accompanies this order, it is hereby **ORDERED** that the Magistrate Judge's Report and Recommendation is **ADOPTED** and **APPROVED,** and that the Motion to Summary Judgment filed by the defendant is **GRANTED,** and the plaintiffs' complaints are **DISMISSED.** This order renders the defendant's Motion for Stay Pending Arbitration and Motion in Limine MOOT. It is also hereby **ORDERED** that the Preliminary Injunction issued by this Court on August 6, 2003 is **VACATED.**

ENTER:

s/J. RONNIE GREER

UNITED STATES DISTRICT JUDGE

Appendix E

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TENNESSEE

SMITH WHOLESALE COMPANY, INC., ET AL
v.
R. J. REYNOLDS TOBACCO COMPANY
NO. 2:03-CV-30

February 23, 2005, Decided
February 23, 2005, Filed

JUDGES: Dennis H. Inman, United States Magistrate Judge.

REPORT AND RECOMMENDATION

The plaintiffs, wholesale distributors, have sued the defendant, a cigarette manufacturer, for pricing discrimination under § 2(a) of the Clayton Act, as amended by the Robinson-Patman Act, codified at 15 U.S.C. § 13(a). The defendant has moved for summary judgment on two bases: that its prices are "functionally available" to every distributor and therefore are not discriminatory, and that the plaintiffs have failed to prove causation of "antitrust injury."[1] The motion has been referred by the District Judge to the Magistrate Judge for a report and recommendation. A hearing was held on February 8, 2005.

II. FUNCTIONAL AVAILABILITY

The plaintiffs are wholesale distributors of cigarettes, among other things; tobacco products constitute at least fifty percent of their sales to retailers. They purchase cigarettes

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[1] Doc. 164.

from various manufacturers, of which defendant is one, and then resell or distribute those cigarettes to retail outlets, such as grocery stores, convenience stores, and the like. The plaintiff-wholesalers sell virtually every brand of cigarettes, from those of the old-line large manufacturers, such as R. J. Reynolds and Phillip Morris, to those of relatively new manufacturers, sometimes colloquially referred to as "off brands," and referred to in this litigation as "fourth tier" cigarettes. In addition to its premium or highest-priced cigarettes, the defendant also manufactures "savings brand"[2] cigarettes which compete with the fourth tier cigarettes.

In response to a shrinking share of the "savings brand" cigarette market, doubtlessly attributable in large measure to the explosive growth of the fourth tier cigarette market, the defendant adopted its Wholesale Partners Program ("WPP" or "program") in April 2000. The ostensible purpose of the WPP is to provide a financial incentive for its wholesalers to sell to retailers more of defendant's savings brand cigarettes relative to those of other manufacturers. The WPP is a multi-tiered scheme that initially had three levels (level I, level II and level III), which ultimately evolved into ten levels: level I, levels II-A through II-H, and level III. A wholesaler receives either a front-end discount or a back-end rebate in an amount determined by the level "earned" by that wholesaler in the WPP. At level I, the lowest level, the wholesaler receives the smallest possible discount. At the highest level, level III, the wholesaler earns the highest possible discount/rebate.

The mathematical concept underlying the WPP would have given Albert Einstein a headache. First, in each state the defendant ascertained what *percentage* of each

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[2] A euphemism for "relatively cheap."

wholesaler's total sales of savings brand cigarettes consisted of RJR's savings brand cigarettes. Each wholesaler was then ranked in descending order, with the wholesaler having the highest percentage of RJR cigarettes listed at the top, and the wholesaler selling the smallest percentage of defendant's products (relative to the total sales of savings brand cigarettes) at the bottom. The defendant thereupon listed the *volume* of its savings brand cigarettes sold by each of those distributors. It is important to note that the distributor listed at the top, which sold the highest percentage of defendant's products, did not necessarily sell the highest *volume* of defendant's products; indeed, the distributor with the highest percentage of defendant sales very easily could have been the distributor that sold the lowest volume of defendant's products.

After determining the volume of defendant's cigarettes sold by each distributor in the descending order discussed in the preceding paragraph, defendant's marketing wizards ascertained the *total volume of RJR savings cigarettes sold in each state*. Defendant then selected as its state target the RJR *percentage* of that wholesaler whose volume sales, when added to all those above it, equaled eighty-five percent (or as close thereto as possible) of defendant's total wholesale volume in the state. Defendant thereafter calculated a "share-of-savings" target for each wholesaler, using the state targets described above. The target was stated in terms of defendant's "savings brands" as a percentage of the total sales of cheap cigarettes sold by a distributor. For those wholesalers doing business in more than one state (and there were several), defendant had yet another formula that adjusted a multi-state wholesaler's target goals to reflect the different states in which that wholesaler does business. The closer a wholesaler comes to the goal established for it, the higher the incentive level applicable to it. And the higher the incentive level, the lower the price it pays for defendant's

cigarettes. It is at first difficult to understand, and even more difficult to describe in words, but it does have mathematical logic to it, and the resulting state target is intended to capture eighty-five percent of the volume of defendant's savings brand in any particular state.

As noted, the incentive level in which any wholesaler was placed determined the amount that wholesaler paid for defendant's savings brand cigarettes. Obviously, some wholesalers participated at higher levels than others, which meant that they purchased their cigarettes from defendant at a cheaper price. This price differential resulted in this litigation.

Plaintiffs allege that the defendant's pricing scheme is discriminatory and, although it may be facially available to all distributors of defendant's products, the percentage goals in fact are arbitrary, unrealistic, and impossible for the distributors to meet. Not surprisingly, defendant insists otherwise.

At the heart of this litigation lies the doctrine of "functional availability" that had its genesis in *FTC v. Morton Salt Co.*, 334 U.S. 37, 92 L. Ed. 1196, 68 S. Ct. 822, 44 F.T.C. 1499 (1948). In *Morton Salt,* the defendant-manufacturer adopted a discount program based upon the *volume* of the manufacturer's product sold by a distributor. As a practical matter, that volume discount precluded a sizeable number of small distributors from obtaining the advantage of the discounts since they lacked the ability to match the volume sales of much larger distributors. Although the discount program was *theoretically* available to all distributors, as a practical matter it was not, and thus the doctrine of "functional availability" arose. Paraphrased, if a discount program purports to be all-inclusive, but as a practical matter cannot be obtained by all distributors, then it

is a discriminatory pricing scheme that violates the Robinson-Patman Act.

As an initial matter, which side has the burden of proof as far as "functional availability" is open to question; there are cases on both sides of this issue. The Court instructed the parties to file supplemental briefs on this issue, and they have now done so. But as far as this Motion for Summary Judgment is concerned, it really makes no difference which party has the burden of proof; under Fed.R.Civ.P. 56(c), only if there are no genuine issues as to any material facts, and only if the moving party is entitled to a judgment as a matter of law, is summary judgment proper. Moreover, the non-moving party must be indulged with all possible favorable inferences from the facts. *Plott v. Gen. Motors Corp.*, 71 F.3d 1190 (6th Cir. 1995). Therefore, irrespective of who might have the burden of proof at a trial on the merits, summary judgment is precluded if either party demonstrates that there is a genuine issue of material fact. In this case, there are some relatively serious disputes regarding material facts but, for purposes of this motion, the Court accepts as true plaintiffs' version of those facts.

Defendant points out that no case has ever held to be illegal an incentive discount program that is based on a *percentage* of a market share, as opposed to the *volume* of purchases. Indeed, defendant argues that the Robinson-Patman Act was adopted to forestall the evil of a large buyer obtaining a competitive edge over small buyers due to the former's economic power that results from the quantities of goods it is able to purchase by virtue of its size: "The legislative history reveals that the aim of the [Robinson-Patman Act] is to prevent a large buyer from gaining discriminatory preferences over the small buyer solely because of the large buyer's greater purchasing power. [Citations omitted.]" *Bouldis, et al. v. U.S. Suzuki Motor*

Corp., et al., 711 F.2d 1319, 1326 (6th Cir. 1983). Defendant argues that inasmuch as its discounts are in no way related to the volume of purchases, but rather are based on a percentage-increase in the sale of its products, it really is outside the area of concern that Robinson-Patman addresses. Plaintiffs, on the other hand, argue that there is nothing in the Act itself that restricts its prohibition against discriminatory pricing to "large versus small." Apparently, the Supreme Court agrees; in a case involving a more favorable price given to a *small* retailer, the Court held:

> While, as noted, the immediate and generating cause of the Robinson-Patman amendments [to the Clayton Act] may have been a congressional reaction to what were believed to be predatory uses of mass purchasing power by chain stores, neither the scope nor the intent of the statute was limited to that precise situation or set of circumstances. Congress sought generally to obviate price discrimination practices threatening independent merchants and businessmen, presumably from whatever source.

F.T.C. v. Sun Oil Co., 371 U.S. 505, 520, 9 L. Ed. 2d 466, 83 S. Ct. 358 (1963).

To the extent defendant argues that Robinson-Patman does not, and could not, apply to discriminatory pricing based on percentages of market share, the Court is constrained to agree with the plaintiffs. If there is a discrimination or differential in price between different purchasers of the same commodities, and if the effect of that discrimination *may be* to substantially lessen competition, then there is a *prima facie* violation of the Robinson-Patman Act, regardless of the mechanics of that discrimination. *See, Falls City Industries, Inc. v. Vanco Beverage, Inc.*, 460 U.S. 428, 444 n. 10, 75 L. Ed. 2d 174, 103 S. Ct. 1282 (1983).

Therefore, Robinson-Patman applies to discriminatory pricing schemes even if the price differentials are based on percentage of market share as opposed to volume purchases. Nevertheless, defendant insists that its "best price" is as functionally available to each plaintiff as it is to any of that plaintiff's competitors, and the relative sizes of the competitors are utterly irrelevant – all are treated the same in a market-share-based program. Defendant gives the following hypothetical example: Assume that defendant offers a three percent discount if its savings brand cigarettes account for twenty percent of a wholesaler's sales. If Wholesaler "A" sells a total of ten thousand cartons a week, two thousand of which are defendant's savings brand cigarettes, that wholesaler will receive the three percent discount. Wholesaler "B," of much smaller size, sells only one thousand cartons per week, but if two hundred of those cartons are defendant's cigarettes, Wholesaler "B" likewise will receive the three percent discount. As the example shows, defendant's discount program does not favor large volume buyers of its cigarettes.

Plaintiffs argues that they are not challenging market-share-based programs *per se*. Rather, they argue that the state targets in defendant's program are not realistic and therefore *functionally unavailable* to them. In response to defendant's argument that any given discount is functionally available to any distributor, irrespective of that distributor's size, plaintiffs argue that those goals are unattainable by them because of the nature of the areas in which they do business. Specifically, plaintiffs argue that they sell to retailers in relatively rural "poor" areas in which the demand for cheaper, fourth tier cigarettes is high and, inasmuch as the distributors cannot affect consumer demand, as a practical matter they cannot attain the percentage goals set by defendant *unless* they simply curtail or eliminate sales of fourth tier cigarettes to their retail customers.

In answer to this argument, defendant posits that the wholesalers have a choice; it may be a difficult choice, but nevertheless it is a choice. And if they can attain defendant's marketing goal by curtailing their sales of fourth tier cigarettes, that is a choice they have the right to make. On the other hand, they have an equal right not to curtail or eliminate theirs sales of fourth tier cigarettes and receive a lower discount on defendant's products. In either event, plaintiffs have a choice. In support of its position that having to make a choice does not make defendant's discount functionally unavailable, defendant cites a number of cases. In *Sweeney & Sons, Inc. v. Texaco, Inc.*, 637 F.2d 105 (3rd Cir. 1980), defendant sold its gasoline to various wholesale distributors, including the plaintiff. After the defendant Texaco unilaterally altered the location where plaintiff could load his delivery trucks with defendant's gasoline, which resulted in higher distribution costs for plaintiff, the plaintiff filed suit claiming that this amounted to discriminatory pricing in violation of the Robinson-Patman Act. The Third Circuit, in upholding the dismissal of plaintiff's Robinson-Patman Act claim, stated:

> The [Supreme] court [in *Morton Salt*] emphasized that a major purpose of the Robinson-Patman Act was to eliminate the competitive advantage of a large buyer "over a small buyer solely because of the large buyer's quantity purchasing ability." [Citation omitted.] In the case before us, it is the distributors, not Texaco, who determine where to place their bulk storage plants, and it is the distributors, not Texaco, who decide which retail stations they will supply. Texaco has no control over those decisions.

637 F.2d at 122.

In *Labrador, Inc. v. Iams Co.*, 1995 U.S. Dist. LEXIS 21149, 1995 WL 714454 (C.D. Cal. 1995), an unreported

district court case from the Central District of California, the plaintiff retailers sued the manufacturer under 15 U.S.C. § 13(d). The district court stated, in dismissing the plaintiff's claim:

> If a manufacturer makes certain terms and conditions available to a party, that party cannot maintain claims against the manufacturer/seller under Sections 2(d) and 2(e) of the Robinson-Patman Act where that party does not accept the terms and conditions and others reap the benefits of such terms and conditions.

1995 U.S. Dist. LEXIS 21149, [WL] at *6.

In *Capital Ford Truck Sales, Inc., v. Ford Motor Co.*, 819 F.Supp. 1555 (N.D. Ga. 1992),a Ford truck dealership sued Ford Motor Company under Robinson-Patman for granting price concessions to those dealers which sold ten or more trucks in a single transaction. The plaintiff claimed that it did not qualify for the maximum discount that other dealers enjoyed because it did not sell to large quantity purchasers. The district court, in dismissing this aspect of plaintiff's suit, said:

> This appears, however, to be the result of a marketing decision by Capital Ford to concentrate on sales to smaller volume customers as opposed to large fleet purchasers. Plaintiffs do not allege that Defendant in anyway restricted the customers to whom Capital Ford could sell, and Plaintiffs have adduced absolutely no evidence that the purchase quantity discounts offered under the [discount] program were not realistically available to all dealers if they chose to bid larger volume buyers. [Citing *Bouldis v. U.S. Suzuki Motor Corp.*, 711 F.2d 1319 (6th Cir. 1983).]

819 F.Supp. at 1579.

In response to defendant's argument that plaintiffs can meet defendant's marketing goals if they choose to do so, plaintiffs suggest that this "choice" is not only unpalatable, it is self-destructive inasmuch as most of their retail customers prefer to buy all their stock-in-trade from a single distributor. Therefore, so plaintiffs argue, if they curtail their sales of fourth tier cigarettes to the retail customers, those retail customers will take their *entire* business to another wholesaler. In other words, plaintiffs argue that an *unreasonable,* draconian business decision is not a "choice" in the real sense of that word, and that they should not be compelled to surrender business, or perhaps even risk their very existence, to obtain the best discounts from defendant. And thus we arrive at the crux of this litigation. Because defendant's program is based on a percentage of sales, it is not presumptively suspect as would be a volume-based plan; it is available to any distributor, small or large. But attaining the optimum target entails marketing decisions which, according to plaintiffs, could be disastrous for their business: surrendering or curtailing their sales of fourth-tier cigarettes which, at best, will affect their bottom lines and, at worst, their existence. Plaintiffs insist that as a practical matter they cannot afford to make the decision or choice thrust upon them by defendant, and therefore their targets are is functionally unavailable.

Plaintiffs cite to the Court *Caribe BMW, Inc. v. Bayerische Motoren Werke Aktiengesellschaft*, 19 F.3d 745 (1st Cir. 1994), and suggests that it stands for the proposition that "plaintiff need not give up the advantages of its importer contract in order to obtain the most favorable price."[3] However, the only language in the case that mentions this matter reads as follows:

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[3] Plaintiffs' Argument Binder, Plaintiffs' Outline 3, p. 7

> Caribe also argues that the favored treatment, as a practical matter, was not "available" because BMW AG insisted that it give up various advantages of its importer's contract in order to obtain it. We cannot tell from the complaint, however, just what those advantages were and how they related to the practical "availability" of the favorable treatment given other retailers. Thus, we cannot say, at this time, whether or not Caribe will be able to prove that the favorable price and terms, as a practical matter, were not available. At this stage, however, Caribe has sufficiently alleged they were not.

19 F.3d at 752.

Respectfully, the language from the case itself does not support the inference which plaintiffs seek to draw from it; the court was only reciting the plaintiff's argument.

Plaintiffs also cite *National Dairy Products Corp. v. Federal Trade Commission*, 395 F.2d 517 (7th Cir. 1968). In *National Diary,* the manufacturer-seller sold its products at a lower price to large chain and group store customers, and was sued under Robinson-Patman. The manufacturer argued that the smaller, independent buyers could have obtained the more-favored discounts if they had "joined together into cooperative groups." The Seventh Circuit stated:

> We also cannot accept [defendant's] argument that the disfavored independent should have joined voluntary or cooperative groups and thus obtained higher discounts. The Robinson-Patman Act does not force them to sacrifice their independence. One of the reasons for its enactment was to protect the independents from the chains and other large buying groups. [Citation omitted.]

395 F.2d at 523.

Plaintiffs also cite *Calumet Breweries, Inc. v. G. Heileman Brewing Co., Inc.*, 951 F.Supp. 749 (N.D. Ind. 1994), in support of their position that the reasonableness of a choice is a legitimate inquiry in any market-share-based discount program. In *Calumet,* the beer manufacturer gave discounts to buyers based on the quantities of the manufacturer's beer purchased by those buyers. In other words, the discount system was a *volume*-based system, presumptively suspect under the Robinson-Patman Act by virtue of *Morton Salt, supra.* In *Calumet,* the manufacturer came up with a rather innovative defense: it suggested that the defendant had adequate warehouse space to purchase the volume of beer needed to obtain the most-favored discount. In other words, the defendant argued that plaintiff should buy the beer in large quantities and then store in a warehouse what it could not immediately sell. With respect to this argument, the district court held:

> Moreover, the evidence tends to discount [the manufacturer's] contention that it would be a reasonable business decision for [the buyer,] because of its physical storage capacities and economic resources, to purchase enough beer to obtain the maximum discount. [The manufacturer] argues that [the buyer] does not do so because it has decided to maximize sales of competing brands, such as Anheuser-Busch, rather than aggressively promoting sales of [the manufacturer's] products. According to [the manufacturer,] [the buyer] should compete with [competing distributors] for structuring its purchases: obtaining the maximum discount by buying more than a month's supply of beer, warehousing it, and then selling from inventory in the following month(s).
>
> Nothing in the Robinson-Patman Act or the cases interpreting it suggest that [the buyer's] decision to

> emphasize other brands and remain a (relatively) small seller of [the manufacturer's] products *ipso facto* means [the manufacturer] may charge [the buyer] a higher price . . . . [Quotation from *Morton Salt* omitted.]

951 F.Supp. at 755.

In response to plaintiffs' argument that harsh, unreasonable or even self-destructive choices effectively make defendant's discounts functionally unavailable to them, defendant submitted several cases for the Court's consideration:

In *American Tara Corp. v. International Paper Co.*, 1981 U.S. Dist. LEXIS 14211, 1981 WL 375572 (N.D. Ill. 1981), the defendant-manufacturer instituted a discount program based upon a percentage of past purchases of its product which, paradoxically, tended to favor *small* purchasers. Plaintiff-purchaser argued that defendant's rebate program was not functionally available to it "because plaintiff could not buy that amount from defendant without placing itself in extreme jeopardy." 1981 U.S. Dist. LEXIS 14211, [WL] at *2. The district court stated:

> As plaintiff notes, no court has decided that a purchaser must choose "between deserting its valued traditional sources of supply or suffering discriminatory prices"; no court has been presented with facts identical to these, however, and, in similar situations, courts have sanctioned programs which imposed choices as the one condemned by plaintiff in this case. In *Shreve Equipment, Inc. v. Clay Equipment Corp.*, 650 F.2d 101, 1981-1 Trade Cas. (CCH) P64016 (N.E. Ohio 1981), the court held that, if the plaintiff could ever see the challenged discounts if plaintiff's president and chief shareholder had resigned from his job with defendant, the discounts

were functionally available to plaintiff. In *Edward J. Sweeney & Sons, Inc. v. Texaco*, 637 F.2d 105 (3rd Cir. 1980), the court upheld a pricing formula which required the plaintiff to choose between moving its storage plant and changing the retail stations it supplied or paying higher prices. In *United Banana Co. v. United Fruit Co.*, 245 F.Supp. 161 (D. Conn. 1965), the court approved a program even though the plaintiff would have had to build rail siding facilities to qualify for the lower price.

The holdings in those cases reflect the rationale for the functional availability defense and control our holding in this case. The plaintiffs in those cases and in this case could have qualified to receive the lower prices but chose based on their business judgment, to suffer competitive injury if their competitor's purchased at the lower price rather than assume the disabilities or risks in the commitment necessary to purchase at the lower price.

Since plaintiff's competitors had to make the same decision, Tara's choice, not defendant's program, was responsible for the price discrimination. Therefore, the rebates which defendant gave plaintiff's competitors were functionally available to plaintiff and did not violate the Robinson-Patman Act.

1981 U.S. Dist. LEXIS 14211, [WL] *3.

Thus, so defendant argues, even if the plaintiff-distributors are confronted with a *hard* choice, even a potentially self-destructive choice, each and every one of them face that same choice and there is no discrimination.

Firstly, the Court disagrees with the plaintiffs that defendant's decision to set the target goals on a statewide basis was arbitrary and improper. To be sure, there are two

"arbitrary" factors in defendant's calculation. Using a state to set its targets, as opposed to some other geographical or demographical area, was arbitrary, but no other geographical area would have been any less arbitrary. And using eighty-five percent as the baseline target also could be said to be arbitrary, since defendant could have chosen ninety percent, or seventy-five percent, or any other percentage. But picking a number fifteen percent *below* defendant's market share in a given state was not unreasonable. Plaintiffs essentially argue that defendant should have set the targets on a per-distributor basis which, of course, would be tantamount to having no market-share-based incentive program at all. These targets treat all distributors equally; each has the same opportunity to achieve higher discount levels. From the fact that unpleasant, even draconian, business decisions might be required, it does not follow that the discount scheme is *discriminatory.*

Admittedly, the "reasonableness of the choice" issue is troublesome, primarily because this Magistrate Judge appreciates plaintiffs' argument and is sympathetic to it. But if the reasonableness or unreasonableness of business decisions is a factor that must be considered with respect to functional availability of a market-share-based discount program, then such a discount program always will be as inherently suspect as a volume-based discount program. Any given distributor could claim that it could not meet a market-share goal because it would be required to alter its business in some fashion which the distributor subjectively determines to be unreasonable. No seller could ever know if its program was lawful under Robinson-Patman; the legality of any market-share-based discount program only could be ascertained with respect to each and every buyer after a jury decides whether the business decisions forced upon that buyer were reasonable or not. Although plaintiffs argue they are not challenging market-share-based discount programs

per se, in reality they are, simply because any distributor could challenge the target goal as unreasonable *as to it;* and if that distributor prevails, the entire discount program would collapse as unworkable. The result would be "tailor-made" discounts which themselves presumptively violate the Robinson-Patman Act.

The district judge in *Calumet* commonsensically held that a manufacturer could not compel a small business to grow into a big business merely to obtain a discount from the manufacturer. But that is not the situation before this Court. Here, the distributors can remain small if they wish, or expand their territories if they wish; unpleasant though it may be, they can choose to sell less fourth tier products to increase the relative percentage attributable to their sales of defendant's products. And this choice is equally available to every distributor, small and large.

What is so frustrating and unpleasant about this case is that it is virgin territory; there are no cases squarely on point, and many of the cases cited by both parties, for one proposition or another, are heavily fact-dependent. As noted earlier, and as forcefully pointed out by the defendant, there are *no* cases that involve market-share-based discounts. Thus, this Court is largely on its own, sailing into unchartered waters with only a compass and no Global Positioning System.

To be candid, this Magistrate Judge's sympathies lie with the wholesalers and believes that defendant's discount program is "unfair." But capitalism often is unfair, and sometimes even cruel. Some countries have at various times adopted other economic systems that purport to be "fair," but capitalism with all its faults has proven to be superior to all the others.

> "In any competitive economy we cannot avoid injury to some of the competitors. The law does not, and

> under the free enterprise system it cannot, guarantee businessmen against loss. That businessmen lose money or even go bankrupt does not necessarily mean that competition has been injured. H.R. Rep. No. 1422, 81st Cong., 1st Sess. 5-6."

F.T.C. v. Sun Oil Co., 371 U.S. 505, 519, 9 L. Ed. 2d 466, 83 S. Ct. 358 (1963).

Defendant's program is designed to promote its financial welfare at the expense of that of the wholesalers. Perhaps it is unfair, but it is not illegal.

It is recommended that defendant's Motion for Summary Judgment be GRANTED on the basis that its discounts are functionally available to all distributors.

III. CAUSATION/ANTITRUST INJURY AND DAMAGES

Defendant also moves for summary judgment on the basis that no plaintiff has proven causation between the alleged antitrust violation and an injury suffered by any plaintiff.[4] n4 Defendant also insists that no plaintiff has proven damages with the required degree of specificity.

As to nine plaintiffs, their proof regarding damages is simply "lost discounts," the amount of the highest discounts received by any of their competitors under defendant's program. The remaining eleven plaintiffs seek to prove their damages by both the "lost discount" method as just described, as well as proof of lost profits.

With respect to the nine plaintiffs who have proof only of lost discounts, their claims fail as a matter of law. Proving

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[4] Somewhat confusingly, various cases refer to "causation" and "antitrust injury" interchangeably.

only lost discounts amounts to *automatic damages* which are unequivocally prohibited by the Supreme Court in *J. Truett Payne Co. v. Chrysler Motors Corp.*, 451 U.S. 557, 68 L. Ed. 2d 442, 101 S. Ct. 1923 (1981). In *J. Truett Payne,* Chrysler Corporation adopted an incentive program under which it paid its dealers a bonus based on the number of car sales made in excess of the goal or target set for that dealer by Chrysler. Claiming that Chrysler set its goal higher than that of its competitors, and claiming further that such amounted to pricing discrimination, the dealership filed suit against Chrysler under § 2(a) of the Robinson-Patman Act. The issue before the Supreme Court was the "appropriate measure of damages in a suit brought under § 2(a) of the Clayton Act, as amended by the Robinson-Patman Act." *Id.*, at 559. The Court of Appeals reversed a jury verdict in favor of the plaintiff and ordered that the case be dismissed, holding that a plaintiff must prove (1) a violation of the antitrust laws, (2) cognizable injury attributable to the violation, and (3) at least the approximate amount of damage. Apparently the district court allowed the jury to infer both the *existence* and amount of injury from mere proof of discrimination; however, the court of appeals rejected such "automatic damages." *Id.*, at 560. Before the Supreme Court, plaintiff again argued that it was entitled to automatic damages in the amount of the price discrimination and that the jury should be permitted to infer the requisite injury and damage from a showing of a substantial price discrimination. *Id.*, at 561. The Supreme Court flatly stated that it disagreed. *Id.* Firstly, the Supreme Court noted that § 2(a) is a "prophylactic statute" and a violation occurs if the result of any discriminatory pricing scheme *may be* substantially to lessen competition; there is no requirement in § 2(a) that the discrimination actually harmed competition. *Id.*, at 561-562. Damages, however, that result from a violation of § 2(a) are awarded under § 4 of the Clayton Act, which is a "remedial statute":

> To recover treble damages, then, a plaintiff must make some showing of actual injury attributable to something the antitrust laws were designed to prevent. *Perkins v. Standard Oil Co.*, 395 U.S. 642, 648, 89 S.Ct. 1871, 1874, 23 L.Ed.2d 599 (1969) (plaintiff "must, of course, show a causal connection between the price discrimination in violation of the Act and the injury suffered.") It must prove more than a violation of § 2(a), since such proof establishes only that injury *may* result.

451 U.S. at 562.

These nine plaintiffs have offered proof only of "lost discount," without any showing that they in fact suffered an "antitrust injury." Proof of lost discounts is precisely the type of automatic damages prohibited by *J. Truett Payne*. These nine plaintiffs have established neither causation nor damages.

Therefore, apart from the recommendation that the entire suit be dismissed for the reasons set forth in Section I of this report, it is recommended that the claims of these nine plaintiffs, Affiliated, Andalusia, Bates, Church Point, Corso, Dixie, Huntsville, McCarty-Hull, and Yakima, should be DISMISSED.

The eleven remaining plaintiffs assert damages based on both "lost discounts" *and* "lost profits." The matter of lost discounts has been discussed in the preceding paragraphs, and for those reasons it is recommended that proof of lost discounts be DISALLOWED as to these eleven plaintiffs. With respect to their claims based on lost profits, however, defendant contends that these plaintiffs simply have presented no competent evidence that they have sustained any damages. In this regard, defendant argues that plaintiffs' expert, Mr. Folsom, has relied upon statements made to him by representatives of these various plaintiffs, who in turn

relied upon the statements of their sales representatives, who further in turn relied upon statements made to them by retailers concerning how those retailers were doing less business with the plaintiffs as a result of the higher prices charged for defendant's products.

First of all, in an order entered in this case regarding a motion *in limine* filed by defendant with respect to Mr. Folsom's testimony, it is noted that the two-tier hearsay problem has been obviated and, with respect to the one-tier hearsay problem, the Court has allowed that testimony. Further, in another order the Court has determined that Mr. Folsom's opinions are competent expert opinions under *Daubert* and F.R.E. 702. Although proof of *antitrust injury* – causation, if you will – must be proven by a preponderance of the evidence, actual proof of damages is not as rigorous in an antitrust action simply because of the nature of the beast itself. *See, Shreve Equip., Inc. v. Clay Equip. Corp.*, 650 F.2d 101, 106 (6th Cir. 1981). The Court believes that Mr. Folsom's testimony, for the reasons just stated, establishes both causation and damages with the degree of specificity required for both.

Therefore, in the event the District Judge disagrees with the recommendation in Part I of this report and holds that this suit should be allowed to go forward on the question of functional availability, then it is respectfully recommended (1) that defendant's Motion for Summary Judgment with respect to nine of the plaintiffs, Affiliated, Andalusia, Bates, Church Point, Corso, Dixie, Huntsville, McCarty-Hull, and Yakima, be GRANTED, and that defendant's Motion for Summary Judgment with respect to the eleven remaining defendants be DENIED, except with regard to "lost discounts."

Any objections to this report and recommendation must be filed within ten (10) days of its service or further appeal

will be waived. 28 U.S.C. § 636(b)(1)(B) and (C). *United States v. Walters*, 638 F.2d 947, 947-950 (6th Cir. 1981); *Thomas v. Arn*, 474 U.S. 140, 88 L. Ed. 2d 435, 106 S. Ct. 466 (1985). If a party files objections to this report and recommendation, the attorney for that party shall provide a copy of such objections to the opposing counsel on the same day the objections are filed, either by hand-delivery or facsimile transmission. The opposing counsel shall file his/her response to the objections within five business days of the date the objections are filed.

Respectfully submitted,

Date: 2/23/05

s/ Dennis H. Inman

United States Magistrate Judge